Supreme Court U.S.
FILED

No. 98 1381 FEB 26 '99

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID SOHN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DAN L. POOLE
ROBERT B. MCKENNA
U S West, Inc.
1801 California Street
51st Floor
Denver, Colorado 80202
(303) 672-2861

Counsel for U S WEST, Inc.

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Ameritech Corporation

105 pp

WILLIAM P. BARR
WARD W. WUESTE, JR.
M. EDWARD WHELAN
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

PAUL T. CAPPUCCIO
STEVEN G. BRADBURY
PATRICK F. PHILBIN
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 897-5000

Counsel for the GTE Entities

LAWRENCE E. SARJEANT
LINDA KENT
KEITH TOWNSEND
JOHN W. HUNTER
United States Telephone Assn
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States Telephone Association

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

Counsel for Ameritech Corporation

EDWARD D. YOUNG II
MICHAEL E. GLOVER
JAMES G. PACHULSKI
Bell Atlantic Corporation
1320 N. Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Bell Atlantic Corporation

QUESTION PRESENTED

In *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (and consolidated cases) (Jan. 25, 1999), this Court vacated the Federal Communications Commission's rule specifying the network elements that must be provided on an unbundled basis to requesting telecommunications carriers, 47 C.F.R. § 51.319 ("Rule 319"). The FCC order at issue here, called the *Third Order*, addressed the definition of "interoffice transmission facilities," one of the network elements that Rule 319 had designated for unbundling. The question presented is:

Whether the *Third Order* should be vacated and remanded for proceedings consistent with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners here are Ameritech Corporation, Bell Atlantic Corporation, the GTE Entities, U S WEST, Inc., and the United States Telephone Association. The parties to the proceeding in the Eighth Circuit are listed in the captions of the decision below. See App. 1a-10a, *infra*.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies. It has the following non-wholly owned subsidiaries: MATAV, Tele Danmark, and Telecom Corporation of New Zealand. A proposed merger of Ameritech Corporation and SBC Communications Inc. has been announced and is awaiting regulatory approvals.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic -Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition, Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA L.P.O., New York SMSA L.P., Orange County-Poughkeepsie MSA L.P., Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Pittsburgh SMSA L.P., Pennsylvania RSA No. 6(II) L.P., Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, TELE-

TV, TELE-TV Media Partners, L.P., TELE-TV Systems, L.P., Global Directory Services Company, MEDIATEL spol. S.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. Z.o.o., Nord Trans Biuro Reklam Sp. Z.o.o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Limited, Gibralter NYNEX Communications Limited, ESI KF Limited Partnership, Omnitel-Pronto Italia, S.p.A., San Antonio MTA, L.P., Vermont RSA Ltd., Hudson Valley RSA Cellular Partnership, Tomcom, L.P., 1800 Arch Street, L.P., Tucson Cellular Telephone Company, Binghamton MSA Limited Partnership, Binghamton MSA Limited Partnership, Iron Venture III, Springfield Cellular Telephone Company, and Beaufoy Ltd.

The GTE Entities are GTE Services Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc. Each of the GTE Entities is a subsidiary of GTE Corporation, a public-held corporation that provides an array of telecommunications services both domestically and worldwide. GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public:

Acentech Incorporated
AG Communication Systems Corporation
Anglo-Canadian Telephone Company
BABCN, L.L.C. (Service Net)
BBN Corporation
BCT.Telus Communications Inc.
BC TEL
Cable-Axion Digitel Inc.
Cable-Axion Quebec Inc.

Caribbean Reservation Center, C. por A.
CEIET Continental Telefone S.A.
Chesapeake Directory Sales Company
Comunicaciones Telefonicas, C. por A.
Compania Anonima Nacional Telefonos de Venezuela (CANTV)
Conagro Telecommunications, S.A.
Continental Telecommunications Company (Nigeria)
Continental Telephone of Saudi Arabia, Ltd.
CTI Compania de Telefonos del Interior S.A.
CTI Holdings, S.A.
CTI Norte Compania de Telefonos del Interior S.A.
Dantel
DELCOM, INC.
Digital Courier International Inc.
Domain Solutions Corporation
Equicom Systems Management, Inc.
GTE California Incorporated
GTE CyberTrust Japan Incorporated
GTE Directories (B) SDN.BHD.
GTE Directories Corporation Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE Industries Incorporated
GTE Leasing Corporation
GTE Midwest Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE Sylvania S.A. Electronica, Quimica, Industrial y Commercial
GTE Telecom Saudi Arabia Ltd.
GTE Yellow Pages Publishing Hungary Kft
Herold Business Data AG
i2 Corporation
ISM Information Systems Management (B.C.) Corporation

La Compagnie de Telephone Anglo-Canadienne/Anglo-Canadian Telephone Company
Laycon Telecommunications, S.A.
LightStream Incorporated
Mobility Personacom Canada Ltd.
MTX Italia
Pacific Place Cable Ltd.
Page Saudi Arabia Services, LTD.
Panorama Polska Sp. z.o.o.
Parlance Corporation
Parque Industrial ITABO, S.A.
Quebec-Telephone
R.G.B. Technologies Inc.
Radiowealth, Inc.
Rapport Interactive Services Inc.
SCM Integrated Systems SDN.BHD
Sherkate Sahami Khass Telephone Sazi Iran
Signa Gateway Corporation
Stentor Resource Centre Inc.
Stentor Services Inc.
Telectronics Financing Corporation
The Micronesian Telecommunications Corporation
Unicist Communications Corp.
VenWorld Telecom, C.A.
Zona France Las Americas

In addition, GTE Corporation is a partner in the following partnerships and limited partnerships:

Alabama
Alabama 1-Franklin RSA Partnership
GTE Mobilnet of Florence, Alabama Incorporated
Gadsden Celltelco Partnership
Tuscaloosa Cellular Partnership

California
California RSA No. 4 Limited Partnership

Fresno MSA Limited Partnership
GTE Mobilnet of California Limited Partnership
GTE Mobilnet of Santa Barbara Limited Partnership

Florida
Florida RSA #1B (Naples) Limited Partnership

Illinois
Illinois RSA 1 Limited Partnership
Rockford MSA Limited Partnership

Indiana
GTE Mobilnet of Fort Wayne Limited Partnership
GTE Mobilnet of Indiana Limited Partnership
GTE Mobilnet of Indiana RSA #3 Limited Partnership
GTE Mobilnet of Indiana RSA #6 Limited Partnership
GTE Mobilnet of Terre Haute Limited Partnership
Indiana RSA #1 Limited Partnership
Southern Indiana RSA Limited Partnership

Iowa
Iowa RSA No. 4 Limited Partnership
Iowa RSA No. 5 Limited Partnership

Kentucky
Kentucky RSA No. 1 Partnership

New Mexico
New Mexico RSA 3 Limited Partnership
New Mexico RSA No. 5 Limited Partnership
New Mexico RSA 6-1 Partnership

North Carolina
Fayetteville Cellular Telephone Company Limited Partnership

Ohio
GTE Mobilnet of Ohio Limited Partnership
Ohio RSA #3 Limited Partnership

Tennessee
Knoxville Cellular Telephone Company

Texas
GTE Mobilnet of Austin Limited Partnership
GTE Mobilnet of South Texas Limited Partnership
GTE Mobilnet of Texas RSA #11 Limited Partnership
GTE Mobilnet of Texas RSA #16 Limited Partnership
GTE Mobilnet of Texas RSA #17 Limited Partnership
GTE Mobilnet of Texas RSA #21 Limited Partnership
Texas RSA 10B3 Limited Partnership

Virginia
Danville Cellular Telephone Company Limited Partnership
Virginia RSA 5 Limited Partnership
Virginia RSA 5 Retail Limited Partnership

U S WEST, Inc. has no parent companies and no non-wholly owned subsidiaries.

The United States Telephone Association ("USTA") is a non-profit trade association representing the interests of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) . . . . . *passim*

Ameritech Corporation, Bell Atlantic Corporation, the GTE Entities, U S WEST, Inc., and the United States Telephone Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (App. 1a-24a) is reported at 153 F.3d 597 (1998). The Eighth Circuit denied a petition for rehearing (App. 25a) in an unpublished order. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit (App. 26a-84a) is reported at 12 FCC Rcd 12460 (1997).

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1998. A timely petition for rehearing was denied on December 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at App. 85a-87a.

STATEMENT

This case concerns the validity of an order issued by the Federal Communications Commission on August 18, 1997 ("the *Third Order*"),[1] pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act" or "1996 Act"). The *Third Order* concerns the scope of a requirement set forth in an earlier FCC order, called the

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) ("*Third Order*") (App. 26a-84a), petition for review denied, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 597 (8th Cir. 1998) (App. 1a-24a).

First Report and Order,[2] that this Court recently invalidated. See *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (and consolidated cases), slip op. at 20-25 (Jan. 25, 1999). Indeed, the *Third Order* applies the very interpretation of the 1996 Act that this Court held was inconsistent with the statute's plain terms.

A. The *First Report and Order* and *Iowa Utilities Board*

The 1996 Act opens local telephone markets by imposing certain obligations upon incumbent local exchange carriers ("incumbent LECs"). Among other things, the Act requires incumbent LECs to provide competitors with "unbundled" access to the "elements" of their networks. See 47 U.S.C. § 251(c)(3), (d)(2).

In its *First Report and Order*, the FCC promulgated regulations to implement the 1996 Act's local competition provisions and, in particular, the unbundled access provisions. The primary unbundling regulation, Rule 319, identified seven different network elements — the local loop; the network interface device; switching capability; interoffice transmission facilities; signaling networks and call-related databases; operations support systems; and operator services and directory assistance — and required incumbent LECs to provide those elements to competitors on an unbundled basis. See 47 C.F.R. § 51.319(a)-(g).

As part of its analysis supporting promulgation of Rule 319, the FCC purported to examine whether those seven network elements satisfied 47 U.S.C. § 251(d)(2). That pro-

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[2] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1997) ("*First Report and Order*"), vacated in part, *Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part & rev'd in part sub nom., *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (U.S. Jan. 25, 1999).

vision establishes the so-called "necessary and impair" standard, which requires the FCC, in determining which network elements should be subject to the Act's unbundling requirements, to consider whether access to a proprietary network element is "necessary," and whether lack of access to any network element would "impair" a competitor's ability to provide telecommunications services. Under its interpretation of Section 251(d)(2), the FCC determined that each of the seven network elements listed in Rule 319 fulfilled the "necessary and impair" standard. See *First Report and Order*, ¶¶ 388-393, 419-420, 447, 481-482, 490-491, 497-499, 521-522, 539-540.

On petitions for review, the Eighth Circuit approved the FCC's interpretation and application of the "necessary and impair" standard, and accordingly left Rule 319 intact. *Iowa Utiliies Board* v. *FCC*, 120 F.3d 753, 809-810 (1997). This Court reversed, holding that the FCC's interpretation of Section 251(d)(2) was contrary to the plain terms of the Act. *AT&T Corp.* v. *Iowa Utilities Board*, *supra*, slip op. at 22 (FCC's gloss on the "necessary and impair" standard "is simply not in accord with the ordinary and fair meaning of those terms"). Because the FCC's error infected its conclusion as to which network elements must be provided on an unbundled basis, the Court vacated Rule 319 in its entirety. *Id.*, slip op. at 25. The Court remanded the cause for the agency to determine which network elements satisfy the 1996 Act's unbundled access provisions, as properly interpreted.

B. The *Third Order*

The FCC issued the *Third Order* in the same rulemaking docket as the *First Report and Order*. Released after the Eighth Circuit had approved the FCC's interpretation of Section 251(d)(2) in the *First Report and Order*, but before this Court decided *Iowa Utilities Board*, the *Third Order* addressed the definition of "interoffice transmission facilities," one of the network elements to which unbundled access was required in (the now-vacated) Rule 319.

The *Third Order* arose out of two petitions for reconsideration and clarification filed by certain local exchange competitors. The *First Report and Order* required incumbent LECs to provide unbundled access to interoffice transmission facilities, and defined two types of interoffice transport, "shared" and "dedicated." See *First Report and Order*, ¶¶ 428-451; 47 C.F.R. § 51.319(d) (1996) (superseded by *Third Order*).[3] The competitors complained that the *First Report and Order*'s definition of "shared" interoffice transport, set forth in Rule 319(d)(1), was unclear. See *Third Order*, ¶ 20 (noting that "both petitions concerned the definition of shared transport as an unbundled network element") (App. 44a). They asked the FCC to hold that "shared transport" is a single network element consisting of the incumbent's entire interoffice network, including each and every interoffice transmission link in the local network.

The FCC granted the petitions and, as the competitors requested, amended the definition of "shared transport" in Rule 319(d)(1). See *Third Order*, Appendix A. In so doing, the FCC concluded that "shared transport" satisfied the Section 251(d)(2) "necessary and impair" standard, as that provision had been interpreted in the *First Report and Order*. See *Third Order*, ¶¶ 31-37, 49, 51 (citing *First Report and Order*, ¶¶ 283, 285-287, 419-420, 441, 446-447). The FCC left intact Rule 319(d)(2), which imposed the actual obligation upon incumbent LECs to provide unbundled access to interoffice transport. See 47 C.F.R. § 51.319(d)(2).

Numerous telecommunications carriers, including incumbent LECs, filed petitions for review of the *Third Order*. The incumbent LECs argued that permitting competitors to

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[3] The *First Report and Order* defined "shared" transport to be unbundled transmission facilities "shared by more than one customer or carrier," and "dedicated" transport to be unbundled transmission facilities "dedicated to a particular customer or carrier." 47 C.F.R. § 51.319(d)(1) (1996) (superseded by *Third Order*).

share an incumbent's entire existing interoffice network violated the 1996 Act's unbundling provisions. The incumbents asserted, among other things, that access to that interoffice network is not something that a competitor legitimately needs to compete in local service markets, but rather provides an unfair advantage that Congress never intended. The Eighth Circuit denied the petitions for review.

REASONS FOR GRANTING THE PETITION

The *Third Order* addresses the scope of the FCC requirement, set forth in Rule 319(d)(2) and the *First Report and Order*, that incumbent LECs provide unbundled access to "shared" interoffice transport. This Court has now invalidated that requirement as inconsistent with the 1996 Act. See *Iowa Utilities Board*, slip op. at 20-25. Thus, the foundation underlying the *Third Order* — *i.e.*, the existence of a regulation obligating incumbents to provide interoffice transport on an unbundled basis — has disappeared.

Because the *Third Order* alters the reach of a regulation that no longer exists, that Order should be vacated and remanded to the FCC. See *Lawrence* v. *Chater*, 116 S. Ct. 604, 607 (1996) (Supreme Court decisions rendered after the judgment below was issued are among the "intervening developments" supporting entry of a GVR); *id.* at 613-614 (Scalia, J., dissenting) (same) (citing cases).

In addition, in determining that "shared transport" satisfies Section 251(d)(2), the *Third Order* applied the interpretation of the "necessary and impair" standard that the FCC had adopted in the *First Report and Order*. See *Third Order*, ¶¶ 31-37, 49, 51. In *Iowa Utilities Board*, the Court held that interpretation to be unlawful, and directed the FCC on remand to determine whether, and (if so) to what extent, each of the seven network elements listed in Rule 319 (including interoffice transport) satisfies Section 251(d)(2). Thus, *Iowa Utilities Board* requires the FCC to revisit the very issues addressed in the *Third Order* — including the

scope of the (now-vacated) interoffice transport requirement, and whether the "shared" variety of interoffice transport satisfies Section 251(d)(2).

Finally, the *Third Order* is inexorably linked to the FCC's reconsideration of other network elements. In particular, the FCC must determine on remand whether the switching network element (see the now-vacated Rule 319(c)) satisfies the "necessary and impair" standard. As the FCC acknowledged in the *Third Order*, a competitor that "purchase[s] shared transport as a network element to provide local exchange service must also take local switching." *Third Order*, ¶ 47. Accordingly, whether incumbents may be required to provide unbundled access to "shared" interoffice transport will turn, at least in part, upon whether (and, if so, to what extent) switching is found to satisfy the 1996 Act's unbundled access provisions.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for reconsideration with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*, *supra*.

Respectfully submitted.

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID SOHN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DAN L. POOLE
ROBERT B. MCKENNA
U S West, Inc.
1801 California Street
51st Floor
Denver, Colorado 80202
(303) 672-2861

Counsel for U S WEST, Inc.

EDWARD D. YOUNG III
MICHAEL E. GLOVER
JAMES G. PACHULSKI
Bell Atlantic Corporation
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Bell Atlantic Corporation

WILLIAM P. BARR
WARD W. WUESTE, JR.
M. EDWARD WHELAN
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

Counsel for the GTE Entities

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

Counsel for Ameritech Corporation

LAWRENCE E. SARJEANT
LINDA KENT
KEITH TOWNSEND
JOHN W. HUNTER
United States Telephone Assn
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States Telephone Association

PAUL T. CAPPUCCIO
STEVEN G. BRADBURY
PATRICK F. PHILBIN
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 897-5000

Counsel for the GTE Entities

FEBRUARY 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3389

Southwestern Bell Telephone Company,

Petitioner,

Ameritech Corporation; Time Warner; Communications Holdings; US Telephone Association; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Communications Minnesota, Inc.; Contel of the South, Inc.; Association for Local Telecommunications Services; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3576

US West, Inc.,

Petitioner,

Southwestern Bell Telephone Company,

Intervenor on Appeal,

Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Ameritech Corporation; Time Warner Communications Holdings, Inc.; Association for Local Telecommunications Services; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE Southwest, Incorporated; GTE South, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.;

Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3663

Ameritech Corporation,

Petitioner,

Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal,

No. 97-4106

Southern New England Telephone Company,

Petitioner,

Independent Telephone and Telecommunications Alliance; Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.;

Competitive Telecommunications Association,

Intervenors on Appeal.

Petitions for Review
of an Order of the
Federal Communications Commission

JUDGMENT

This cause was submitted on the petition for review of an order of the Federal Communiations Commission, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the order of the Federal Communications Commission is affirmed in accordance with the opinion of this Court.

The consolidated petitions for review are denied.

August 10, 1998

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3389

Southwestern Bell Telephone Company,

Petitioner,

Ameritech Corporation; Time Warner Communications Holdings; US Telephone Association; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Association for Local Telecommunications Services; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3576

US West, Inc.,

Petitioner,

Southwestern Bell Telephone Company,

Intervenor on Appeal,

Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Ameritech Corporation; Time Warner Communications Holdings, Inc.; Association for Local Telecommunications Services; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE Southwest, Incorporated; GTE South, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3663

Ameritech Corporation,

Petitioner,

Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal,

No. 97-4106

Southern New England Telephone Company,

Petitioner,

Independent Telephone and Telecommunications Alliance; Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

Petitions for Review
of an Order of the
Federal Communications Commission

Submitted: January 15, 1998
Filed: August 10, 1998

Before BOWMAN,[1] WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Pursuant to 47 U.S.C. § 402(a) (1994) and 28 U.S.C. § 2342(1) (1994), various incumbent local exchange carriers (incumbent LECs)[2] petition for review of the Federal Communication Commission's (FCC's) Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 12 FCC

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[1] The Hon. Pasco M. Bowman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 18, 1998.

[2] Ameritech Corp., Southern New England Telephone Co., Southwestern Bell Telephone Company, and U.S. West, Inc. all filed petitions for review. These petitions have been consolidated, and Bell Atlantic Telephone Companies, GTE Entities, and United States Telephone Association have all intervened in support of the consolidated petitions. We refer to this group collectively as "petitioners" throughout.

Rcd. 12460 (Aug. 18, 1997) (Third Order on Reconsideration). The consolidated petitions challenge both the FCC's determination that shared transport constitutes a network element as defined by 47 U.S.C.A. § 153(29) (West Supp. 1998), and the FCC's determination that incumbent LECs must make shared transport available to new entrants on an unbundled basis pursuant to 47 U.S.C.A. § 251(c)(3), (d)(2). We affirm the FCC's order and deny the consolidated petitions for review.

I.

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of Title 47, United States Code) (the Act).[3] The issues presented in this case relate to the Act's local competition provisions. The Act requires incumbent LECs to allow new entrants access to their networks in three different ways. Specifically, a LEC must (1) permit requesting competitors to interconnect with the LEC's local network, (2) provide competitors with access to individual elements of its network on an unbundled basis, and (3) allow competitors to purchase its telecommunications services for resale. 47 U.S.C.A. § 251(c)(2)-(4). Together, these duties regarding interconnection, unbundled access, and resale are intended to provide would-be competitors with realistic opportunities to enter the market for local exchange service.

The issues presented in the consolidated petitions for review pertain to the incumbent LECs' duties regarding unbundled access. Section 251(c)(3) requires incumbent LECs to provide new entrants with "nondiscriminatory access to *network elements* on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." (emphasis added). The Act defines "network element" as follows:

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[3] All citations to sections and subsections of the Act are to the 1998 Supplement to West's United States Code Annotated.

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C.A. § 153(29).

Although Congress defined the term "network element" in the Act, it invested the FCC with the authority to determine *which* network elements should be made available to new entrants on an unbundled basis. *See* 47 U.S.C.A. § 251(d)(2). Section 251(d)(2) limits the FCC's authority in this regard only insofar as it requires the FCC to consider two factors "at a minimum" as it makes this decision. These factors are whether "access to such network elements as are proprietary in nature is necessary," and whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.*

On August 8, 1996, the FCC issued its First Report & Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499 (Aug. 8, 1996) (First Report & Order), in which it established rules to implement the local competition provisions of the Act. In this order, the FCC identified various network elements and determined, pursuant to its authority under section 251(d)(2), that an incumbent LEC must make each of the elements the FCC had identified available to the LEC's competitors on an unbundled basis. *See* First Report & Order ¶ 262; *id.* at A.P. B (47 C.F.R. § 51.319).[4] Salient for our purposes is the FCC's treatment of interoffice transmission facilities, specifically *shared* interoffice transmission facilities. Interoffice transmission facilities

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[4] Because the version of 47 C.F.R. § 51.319 attached to the First Report & Order differs in relevant respects from the current version, we refer to appendix B of the First Report & Order when speaking of the regulation as originally adopted in that order.

are the highways of the local exchange. They connect the end offices and tandem switches within the local exchange to one another and carry telephone traffic between and among these offices and switches. *See* First Report & Order, A.P.. B (47 C.F.R. § 51.319(d)(1)). Interoffice transmission facilities are distinct from both the local loops, which connect end users to the local exchange, *see id.* (47 C.F.R. § 51.319(a)), and the various switches (local and tandem), which determine which interoffice transmission facilities are used to transport the traffic from switch to switch, *see id.* (47 C.F.R. § 51.319(c)). In its First Report & Order, the FCC emphasized that switching and transport are distinct network elements, each of which must separately be made available to entrants on an unbundled basis. *See id.* ¶¶ 410, 440; *accord* 47 U.S.C.A. § 271(c)(2)(B)(v, vi) (requiring LECs to offer "[l]ocal transport . . . unbundled from switching or other services" and "[l]ocal switching unbundled from transport, local loop transmission, or other services").

In the First Report & Order, the FCC distinguished *dedicated* transmission facilities from shared transmission facilities, and treated each separately for purposes of unbundled access. *Id.* (47 C.F.R. § 51.319(d)(1)). Dedicated transmission facilities, which do not here concern us, are those transmission facilities used by a single customer or carrier. *Id.* Shared transmission facilities, on the other hand, carry traffic of multiple customers or carriers. *Id.* Regarding shared transmission facilities, the FCC initially determined only that incumbent LECs must provide "unbundled access to shared transmission facilities between end offices and the tandem switch." *Id.* ¶ 440. The FCC did not explain its meaning in detail, but some of its comments suggested that the FCC perhaps anticipated that each individual shared transmission facility—i.e., each link—must be made available as a separate unbundled network element. *See id.* ¶ 442 ("We find that it is technically feasible for LECs to unbundle the foregoing interoffice facilities as individual network elements."); *id.* ¶ 441 ("By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing network, or it can combine its own interoffice facilities with those of the incumbent LEC."); ***but see*** *id.* at App. B (47 C.F.R. § 51.319(d)(2)) (referring to the "use of

the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier."). The exact nature of the incumbent LECs' unbundling duties regarding shared transmission facilities remained subject to dispute until the FCC issued its Third Order on Reconsideration, discussed below.

On July 18, 1997, this court issued an opinion in which we affirmed in part and vacated in part the FCC's First Report & Order. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 819-20 (8th Cir. 1997), *cert. granted sub nom., AT&T Co. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998). In particular, we affirmed the FCC's determination that various features, functions and capabilities of the local exchange network, such as operational support services, operator services, and signaling systems, were "network elements" for purposes of the Act. *Iowa Utils. Bd.*, 120 at 808-10. We similarly affirmed the FCC's determination that various facilities, such as interoffice transmission facilities, fell within the statutory definition of network element. See *id.* at 818 n.38 (implying by omission that this regulation was upheld). Finally, we upheld the FCC's section 251(d)(2) determination that the network elements it had recognized should be made available to competitors on an unbundled basis. *Id.* at 808, 809-10.

After the FCC issued its First Report & Order, various interested parties filed petitions for reconsideration and clarification with the FCC. Two of these petitions requested clarification regarding what incumbent LECs must do to make shared transmission facilities available to new entrants on an unbundled basis, pursuant to 47 U.S.C.A. § 251(c)(3). On August 18, 1997, the FCC issued its Third Order on Reconsideration, in which it addressed the issues presented in these two petitions. The FCC acknowledged that, in its First Report & Order, it had only required incumbent LECs to "provide 'shared transport' between the end office and tandem." Third Order on Reconsideration ¶ 2. Upon reconsideration, the FCC eliminated this limitation, concluding that incumbent LECs "should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting LECs' switches—that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches." *Id.* ¶ 2; *see also id.*

¶¶ 25, 26; *id.* at App. A (47 C.F.R. § 51.319)(d)(1)(ii)). Additionally, the FCC clarified that the function of "shared transport" constitutes a *single* network element, and directed incumbent LECs to make this function available on an unbundled basis. *See id.* ¶¶ 25-26, 33, 42-43, 47.

The consolidated petitions seek review of the FCC's Third Order on Reconsideration, arguing that it is contrary to both the Telecommunications Act of 1996 and this court's decision in *Iowa Utilities Board*. We affirm the FCC's order and deny the petitions for review.

II.

We have jurisdiction to review final orders of the FCC pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a) (1994). As we noted in *Iowa Utilities Board*, 120 F.3d at 793, we defer to administrative interpretations of statutes unless they conflict with the plain meaning of a statute, unreasonably construe an ambiguous statute, or are arbitrarily or capriciously adopted. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). We emphasize here, as we did in *Iowa Utilities Board*, that we in no way purport to evaluate the wisdom or prudence of the policy decisions underlying the Act. 120 F.3d at 793. Rather, if we find that the agency's reading of a statute is a permissible one, "we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" *Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915 (1998) (quoting *Chevron*, 467 U.S. at 843 n.11).

A. The Designation of "Shared Transport" as a Network Element is Consistent with the Act and Our Decision in *Iowa Utilities Board*.

Petitioners argue that the FCC misinterpreted the Act when it determined that shared transport constitutes a network element as defined in section 153(29). They argue that, because the First Report & Order (arguably) defined each shared transmission facility between an end office and a tandem switch as a *separate* network element, the FCC has no power to aggregate all of an

incumbent LEC's shared transmission facilities and designate the function which these facilities serve—shared transport—as a single network element. They further argue that because the function of "shared transport" constitutes so significant a portion of the local exchange, it cannot be considered a mere "network element." We disagree.

The term "network element" is defined by the Act. This definition states that both the individual "facilit[ies] or equipment" of the local exchange *and* the "features, functions, and capabilities which are provided by means of such facilit[ies] or equipment" constitute "network elements" for purposes of the Act. *See* 47 U.S.C.A. § 153(29); *see also Iowa Utils. Bd.*, 120 F.3d at 809. For this reason, we held in *Iowa Utilities Board* that operational support services, operator services, directory assistance, call waiting, caller I.D., call forwarding, and signaling—all features or functions supported by a variety of different facilities or equipment—fell within the statutory definition of "network element." *See* 120 F.3d at 809. There we wrote as follows:

> Simply because these capabilities can be labeled as "services" does not convince us that they were not intended to be unbundled as network elements. While subsection 251(c)(4) does provide for the resale of telecommunications services, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3). We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale. [The features then at issue] satisfy the definition of "network element;" consequently, they are subject to the unbundling requirements of subsection 251(c)(3).

Id. at 809-10 (footnote omitted).

Using the same logic, we conclude that shared transport is similarly a network element. It is a "feature, function, [or]

capability," and it is provided by facilities and equipment used in the provision of a telecommunications service. The statutory definition requires no more. *See* 47 U.S.C.A. § 153(29). In fact, the question presented in the case at hand is easier than the one we dealt with in the above-quoted passage of *Iowa Utilities Board*. There, we dealt with "finished services"[5] such as directory assistance and operations support services, while here, we deal with shared transport, which petitioners acknowledge is of no use whatsoever unless a new entrant additionally purchases switching. (*See* Br. for Pet'rs Ameritech , et al., at 29.) Accordingly, we conclude that the plain meaning of the statute supports the FCC's determination that shared transport is a network element as defined in section 153(29). *See Chevron*, 467 U.S. at 842-43.

B. The FCC's Determination that Incumbent LECs Must Make "Shared Transport" Available to Entrants on an Unbundled Basis Comports With the Act.

Logically separate from the FCC's designation of shared transport as a network element is the FCC's determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3). As discussed above, section 251(d)(2) provides the FCC with the authority to make such determinations and does not limit this authority except to direct the FCC to consider two factors as it does so. First, the FCC must consider whether "access to such network elements as are proprietary in nature is necessary." 47 U.S.C.A. § 251(d)(2)(A). Second, it must consider whether "the failure to provide access to such network elements would impair the ability

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[5] In Iowa Utilities Board, we were careful not to rule on the issue of whether operator services, directory assistance, caller I.D., call forwarding, and call waiting could be classified as "services" subject to the resale provisions of the Act, because that question was not properly before us. See 120 F.3d at 810 n.29 ("Even though the parties seem to agree that operator services, directory assistance, caller I.D., call forwarding, and call waiting can also be classified as 'services,' we make no ruling on this particular issue."). We held simply that these functions, features, and capabilities constituted network elements and were subject to the unbundling requirements of subsection 251(c)(3), regardless of whether they additionally could be considered services. Id. at 809-10.

of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B).[6]

Where, as it has here in § 251(d)(2), Congress expressly delegates to an agency the power to formulate policy and fill gaps in a statutory scheme, we defer to agency regulations promulgated pursuant to such delegation "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843. Here, Congress limited the FCC's authority only by directing it to consider "at a minimum" the two above-described factors, and petitioners do not argue that the FCC failed to give adequate consideration to either one. 47 U.S.C.A. § 251(d)(2). In fact, petitioners do not assert that the FCC violated the express language of section 251(d)(2) or any other provision of the Act. Rather, petitioners argue that the FCC's decision that incumbent LECs must provide shared transport on an unbundled basis is inconsistent with Congress's overarching intention of maintaining a meaningful distinction between unbundled access to network elements and resale.

The distinction between unbundled access and resale is important, petitioners argue, because sections 251(c)(3) and 252(d)(1) require incumbent LECs to provide unbundled access at cost-based rates, while sections 251(c)(4) and 252(d)(3) allow incumbent LECs to provide retail services for resale at a higher price, equal to the LEC's retail subscriber rates less avoided costs. Petitioners argue that, if use of all of an incumbent LEC's shared transport facilities may be collectively purchased on a per-minute-of-use basis, entrants will effectively be able to purchase preassembled platforms for resale at the lower cost-based price reserved for unbundled access to network elements. Petitioners argue that if this is allowed to occur, the distinction between resale and unbundled access will be obliterated.

This argument is predicated on petitioners' speculative assumption that shared transport will be priced on a usage-sensitive basis. Because the pricing scheme for shared transport (and all other unbundled elements) will be determined by the state

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[6] We upheld the FCC's interpretation of section 251(d)(2) in Iowa Utilities Board. See 120 F.3d at 810-12.

commissions, *see* 47 U.S.C.A. § 252(c)(2); *Iowa Utils. Bd.*, 120 F.3d at 818, it is impossible for this court to determine at this time whether shared transport will be priced in such a way as to erode the distinction between resale and unbundled access. Since, as in *Iowa Utilities Board*, "we do not know what the state-determined rates [or even what the rate structure] will be," it follows that petitioners' arguments regarding the actual costs that entrants will incur are "speculative at best." 120 F.3d at 816. Until the state commissions exercise their authority to determine how shared transport will be priced (i.e., whether on a flat, use-sensitive, or other basis, and at what price), we could do no more than conjecture as to whether the unbundled sale of shared transport will erode the careful distinction between resale and unbundled access. Accordingly, we decline at this time to consider petitioners' argument to this effect. There will be time enough to do so once a state commission has compiled a record, applied its expert analysis, and rendered a decision, and an appeal has been taken to a federal district court pursuant to § 252(e)(6).

Petitioners also argue that the FCC's determination that incumbent LECs must provide shared transport on an unbundled basis is inconsistent with *Iowa Utilities Board*, in which we wrote:

> [Section] 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new

> entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

120 F.3d at 813.

Petitioners argue that this holding should be read to prohibit the FCC from requiring incumbent LECs to provide shared transport as a single unbundled element at a cost-based price. They argue that treating shared transport as a single unbundled element is the functional equivalent of requiring incumbent LECs to combine individual transmission facilities, which are themselves network elements, and provide them to new entrants on a bundled basis. They argue that by defining "shared transport" broadly as a function derived from numerous shared transmission facilities, the FCC has acted in contravention of our *Iowa Utilities Board* decision.

In support of this reading, petitioners quote then-FCC Chairman Reed Hundt, who opined that the Third Order on Reconsideration "highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis." Separate Statement of Chairman Reed Hundt (attached to the Third Order on Reconsideration). We conclude that Chairman Hundt's remarks were addressed to the provisions of 42 C.F.R. § 51.315(b), which then prohibited an incumbent LEC from separating requested network elements that it currently combined in its own configuration. Because we had not yet vacated subsection 315(b) when the FCC issued its Third Order on Reconsideration, the FCC believed at that time that it could prevent LECs from disassembling the combinations of individual network elements that the LECs had already assembled in various configurations to provide local telecommunications services. *See* Third Order on Reconsideration ¶ 44. Shortly after the issuance of the Third Order on Reconsideration, we vacated subsection 315(b) in response to a petition for rehearing. *See Iowa Utils. Bd.*, 120 F.3d at 813. Accordingly, to the extent that the FCC relied on subsection 315(b) as support for the Third Order on Reconsideration, that reliance is no longer justified.

Mr. Hundt's remarks and paragraph 44 notwithstanding, we respectfully disagree with petitioners' argument that the Third

Order on Reconsideration violates our mandate in *Iowa Utilities Board*. While the existence of § 51.315(b) may have provided some additional support for the FCC's determination that shared transport is a network element subject to unbundled access, it was certainly not the principal basis for that determination. As discussed above, the statutory definition of "network element" contained in § 153(29) expressly includes both individual network facilities and the functions which those facilities provide, either individually or in consort. Pursuant to section 251(d)(2), it is within the authority of the FCC to determine which of these network elements—the facilities, the functions, or both—incumbent LECs must make available on an unbundled basis. Accordingly, when the FCC made its decision on reconsideration regarding shared transport, it was acting according to express statutory authority.

In *Iowa Utilities Board*, on the other hand, the FCC was acting in the absence of any statutory authority and in violation of section 251(c)(3) of the Act. There we were faced with the FCC's attempt to force incumbent LECs to make available precombined packages of already assembled network elements (i.e., platforms), which the FCC had never suggested were themselves network elements. Because the Act does not invest the FCC with the authority to require LECs to "bundle" elements and provide them on a combined basis, and because section 251(c)(3) expressly provides that network elements are to be provided on an "unbundled" basis "that allows requesting carriers to combine such elements," we held that the FCC had violated the Act. *See* 120 F.3d at 813.

In short, because the FCC action currently at issue—requiring LECs to provide access to shared transport on an unbundled basis—was made pursuant to express statutory authority, this case is distinguishable in this important respect from *Iowa Utilities Board*, where we held that the FCC had no authority to order LECs to combine network elements. Because we find that the statutory authority provided in §§ 153(29) and 251(d)(2) is sufficient, standing alone, to support the FCC's determination that shared transport is a network element, the fact that the FCC may

have also relied on a rule (§ 51.315(b)) we later vacated is of little consequence.

Indeed, we believe that our decision in *Iowa Utilities Board* supports our decision in the case at hand. As discussed *supra* under subheading A, we expressly upheld the FCC's section 251(d)(2) determination that various "functions" should be provided on an unbundled basis, notwithstanding the fact that these functions could also be considered finished services purchasable for resale pursuant to section 251(c)(4). *See Iowa Utils. Bd.*, 120 F.3d at 809 (acknowledging that "a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale"). If the FCC may require incumbent LECs to provide unbundled access to functions and capabilities which may also be purchasable at retail as "finished services" (e.g., caller I.D., call waiting, call forwarding, operator services, and directory assistance), it certainly may require LECs to provide unbundled access to a separate function or capability such as shared transport which, when combined with other network elements, enables a new entrant to provide local telecommunications service.

In short, we hold that the FCC's determination that shared transport should be made available to entrants on an unbundled basis is not arbitrary, capricious, or otherwise contrary to law. *See Chevron*, 467 U.S. at 843.

C. The FCC Did Not Assert Pricing Authority in the Third Order on Reconsideration.

Petitioners and intervenors have expressed concern regarding paragraphs 30 and 35 of the Third Order on Reconsideration, in which the FCC opined that shared transport should be priced on a usage-sensitive, per-minute-of-use basis. Petitioners correctly note that, under our cases, the FCC has no authority to establish pricing for shared transport or any other network element. *See Iowa Utils. Bd.*, 120 F.3d at 794-96; *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 537-38 (8th Cir. 1998), *petitions for cert. filed*, 66 U.S.L.W. 3672 (March 13, 1998) (Nos. 97-1519 & 97-1520).[7]

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[7] Only when a state commission fails to act to carry out its

Clearly, any attempt by the FCC to assert authority over the pricing of unbundled network elements would violate both the Act as we read it and our decision in *Iowa Utilities Board*. However, we do not believe that the relevant passages of the Third Order on Reconsideration reflect any such attempt on behalf of the FCC. We read the relevant language in both paragraphs 30 and 35 to be dicta, in which the FCC expresses its opinion as to how the states ought to approach the question of pricing. Clearly, the FCC expresses a preference for usage-based pricing, but it follows this discussion with an express acknowledgment that, pursuant to *Iowa Utilities Board*, it "may not establish pricing rules for shared transport." Third Order on Reconsideration ¶ 30. In light of this express acknowledgment, we reject petitioners' assertion that language in either paragraph 30 or 35 represents an attempt to assert pricing authority in disregard of our *Iowa Utilities Board* decision.

Finally, we agree with petitioners that certain unvacated language in the First Report & Order can be read to assert pricing authority. *See id.* ¶ 258 ("Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities *on a minute-by-minute basis*.") (emphasis added). However, this language was drafted before our decisions in *Iowa Utils. Bd.*, 120 F.3d at 793-800, and *Iowa Utils. Bd.*, 135 F.3d at 537-38, and we believe the FCC's current position is as expressed in paragraph 30 of the Third Order on Reconsideration.

III.

Accordingly, we deny the consolidated petitions for review and affirm the Federal Communications Commission's Third Order on Reconsideration.

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responsibility under § 252 to determine rates for unbundled access to network elements is the FCC authorized to step in and assume the state commission's pricing role. 47 U.S.C.A. § 252(e)(5).

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3389 / 3576 / 3663 / 4106

Southwestern Bell Telephone Company, et al.,	*	
Petitioners,	*	Petitions for Review of an Order
vs.	*	of the Federal Communications
Federal Communications Commission, et al.,	*	Commission
Respondents.	*	

The petition for rehearing filed by the petitioners has been considered by the court and is denied.

December 4, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

Third Order on Reconsideration
and
Further Notice of Proposed Rulemaking

Adopted: August 18, 1997 Released: August 18, 1997

FNPRM Comment Date: October 2, 1997
FNPRM Reply Date: October 17, 1997

By the Commission: Chairman Hundt issuing a separate statement.

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I. INTRODUCTION

1. In this Order, we address two petitions for reconsideration or clarification of the *Local Competition and Order*[1] regarding the obligation of incumbent local exchange carriers (LECs) to provide unbundled access to interoffice transport facilities on a shared basis.[2] We intend to address petitions for reconsideration of other aspects of the *Local Competition Order* in the future.

2. In the *Local Competition Order*, which established rules to implement sections 251 and 252 of the Communications Act of 1934 (the Act),[3] as amended by the Telecommunications Act of 1996,[4] the Commission required incumbent LECs "to provide unbundled access to shared transmission facilities between end

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, aff'd in part and vacated in part sub. nom. CompTel. v. FCC*, 11 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th. Cir., Jul. 18, 1997) (*Iowa Utilities Bd.*).

[2] 47 C.F.R. § 51.319(d).

[3] 47 U.S.C. § 251.

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.*

offices and the tandem switch."[5] In this reconsideration order, we first explain that the *Local Competition Order* required incumbent LECs to provide requesting carriers with access to the same transport facilities, between the end office switch and the tandem switch, that incumbent LECs use to carry their own traffic. We further explain that, when a requesting carrier takes unbundled local switching, it gains access to the incumbent LEC's routing table, resident in the switch. Second, we reconsider the requirement that incumbent LECs only provide "shared transport"[6] between the end office and tandem. For the reasons discussed below, we conclude that incumbent LECs should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting incumbent LECs' switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. Third, we conclude that incumbent LECs must permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table and transport links that the incumbent LEC uses to route and carry its own traffic. By requiring incumbent LECs to provide requesting carriers with access to the incumbent LEC's rounting table and to all its interoffice transmission facilities on an unbundled basis, requesting carriers can route calls in the same manner that an incumbent routes its own calls and thus take advantage of the incumbent LEC's economies of scale, scope, and density. Finally, incumbent LECs must permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier is also providing local exchange service.

3. We also issue a further notice of proposed rulemaking seeking comment on whether requesting carriers may use shared transport facilities in conjunction with unbundled switching, to

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[5] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440.

[6] Section 51.319(d) of the Commission's rules requires that incumbent LECs provide access on an unbundled basis to interoffice transmission facilities shared by more than one customer or carrier. 47 C.F.R. § 51.319(d). In this reconsideration order, we refer to such shared interoffice transmission facilities as "shared transport."

originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. Moreover, we seek comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.

II. BACKGROUND

A. Local Competition Order

4. Sections 251(c)(3) and 251(d)(2) of the Act set forth standards for identifying unbundled network elements that incumbent LECs must make available to requesting telecommunications carriers.[7] Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[8] Section 251(d)(2) provides that, in identifying unbundled elements, the "Commission shall consider, at a minimum, whether--

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[9]

5. In the *Local Competition Order*, the Commission, pursuant to sections 251(c)(3) and 251(d)(2), identified a minimum list of seven network elements to which incumbent LECs must provide access on an unbundled basis. These network elements included local switches, tandem switches, and interoffice transmission facilities. With respect to interoffice transmission facilities, the Commission required incumbent LECs to provide

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[7] 47 U.S.C. §§ 251(c)(3) and (d)(2).

[8] 47 U.S.C. § 251(c)(3).

[9] 47 U.S.C. § 251(d)(2).

requesting telecommunications carriers access to both dedicated and "shared" interoffice transmission facilities.[10] The Commission defined "interoffice transmission facilities" as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.[11]

The Commission stated that "[f]or some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, [ãnd for] other elements, especially shared facilities such as common transport, [carriers] are essentially purchasing access to a functionality of the incumbent's

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[10] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. 47 C.F.R. § 51.319(d)(2) states:

> The incumbent LEC shall:
>
> (i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;
>
> (ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;
>
> (iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities . . . .

47 C.F.R. § 51.319(d)(2).

[11] 47 C.F.R. § 51.319(d)(1).

facilities on a minute-by-minute basis."[12] In defining the network elements to which incumbent LECs must provide access on an unbundled basis, the Commission adopted the statutory definition of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities.[13] The Commission concluded that "the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch."[14] The Commission found that:

> the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.[15]

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[12] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

[13] The Act defines the term "network element" as:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 3 (29).

[14] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

[15] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

The Commission also determined that "we should not identify elements in rigid terms, but rather by function."[16]

6. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued a decision affirming certain of the Commission's rules adopted in the *Local Competition Order*, and vacating other rules.[17] With respect to issues relevant to this reconsideration decision, the court affirmed the Commission's authority to identify unbundled network elements pursuant to section 251(d)(2), and generally upheld the Commission's decision regarding incumbent LECs' obligations to provide access to network elements on an unbundled basis.[18] The order we issue today is consistent with the court's decision.

B. Petitions

7. Parties contend that the *Local Competition Order* is not clear with respect to incumbent LECs' obligation to provide access to shared transport as a network element. Although only two petitions for reconsideration, filed by WorldCom, Inc. (WorldCom) and the Local Exchange Carriers Coalition (LECC), seek clarification or reconsideration of what incumbent LECs must provide pursuant to section 251(c)(3) with regard to "shared transport," several parties addressed that issue in oppositions to petitions for reconsideration and replies. Moreover, since the record closed in the reconsideration proceeding, some parties have made numerous *ex parte* presentations in this docket regarding their views on the proper definition of shared transport as a network element.

8. The record indicates that one basis for confusion is the discrepancy between our rule defining interoffice transmission facilities under section 251(c)(3), 47 C.F.R. § 51.319(d), and the rule that establishes the rate structure standard for shared transport,

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[16] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[17] *Iowa Utilities Bd. v. FCC*, 1997 WL 403401 (8th Cir. July 18, 1997). *See* n.1 *supra*.

[18] *Iowa Utilities Bd.* at *22-24.

47 C.F.R. § 51.509(d). The Eighth Circuit vacated the Commission's rule, 47 C.F.R. § 51.509(d), which established the rate structure standard for shared transport.[19] Although the discrepancy between our rule defining interoffice transmission facilities and the rate structure rule no longer exists, we nevertheless believe that it is useful to clarify the Commission's rules regarding shared transport. The definition of interoffice transmission facilities includes transmission facilities "dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers[20] owned by incumbent LECs or requesting telecommunications carriers, or *between switches* owned by incumbent LECs or requesting telecommunications carriers."[21] The rule setting forth the rate structure for shared transport, which has been vacated by the Eighth Circuit, addressed only "[s]hared transmission facilities *between tandem switches and end offices*."[22] In the *Local Competition Order*, we promulgated no rules mandating the rate structure for shared transport *between end offices*. WorldCom requests that the Commission clarify that incumbent LECs must offer a usage option for shared transport

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[19] *Iowa Utilities Bd.* at *9, n.20.

[20] A wire center, or serving wire center, is defined as a telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located. 47 C.F.R. § 69.2(rr).

[21] *See* 47 C.F.R. §51.319(d) (emphasis added). Switches include both end office and tandem switches.

[22] 47 C.F.R. § 51.509(d) (emphasis added). That rule (now vacated) stated:

> (d) Shared transmission facilities between tandem switches and end offices. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

47 C.F.R. § 51.509(d).

regardless of whether the traffic is routed through the tandem.[23] LECC requests that the Commission clarify that shared transmission facilities must be provided to a requesting carrier only "in conjunction with" both a local switching and tandem switching capability.[24]

9. More fundamentally, parties ask the Commission to clarify, or reconsider, the definition of shared transport. WorldCom asks the Commission to clarify that section 251(c)(3) requires incumbent LECs to provide shared transport as a network element pursuant to a usage option whereby the requesting carrier pays a single, usage based rate for the routing functionality between the end office and the serving wire center (SWC).[25] LECC, on the other hand, asserts that "transmission facilities are 'shared' only if they are associated with switching capability. If they are not so associated, such facilities presumably must be considered dedicated facilities."[26]

10. In support of WorldCom's petition, various competitive carriers argue that the Commission was clear in the *Local Competition Order* that "shared transport," as defined by the Commission, requires incumbent LECs to make available to requesting carriers access to all transport links between any two incumbent LEC switches (*i.e.*, between two end office switches, between an end office switch and a tandem switch, or between two

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[23] WorldCom Petition at 2, 6-7. *Accord* CompTel Opposition at 3-4 (FCC should establish a usage option for all transport over shared facilities between two incumbent LEC end offices); Sprint Opposition at 6-7 (shared transport to take traffic directly from one end-office switch to another is the most economical means of handling the traffic).

[24] LECC Petition at 33. *Cf.* NYNEX Opposition at 10 (traditionally, shared facilities are only provided by an incumbent LEC between its central offices and its tandems, and not between its central offices and the switching facilities of another carrier).

[25] Worldcom Petition at 2-5. *See also* MCI Opposition at 18; Sprint Opposition at 6.

[26] LECC Petition at 33.

tandem switches) on a per minute of use basis.[27] AT&T notes that, in defining unbundled network elements, the Commission stated that the definition includes "all the features, functions, and capabilities that are provided by means of such facility or equipment" and that "carriers seeking . . . shared facilities, such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis."[28] WorldCom claims that the 1996 Act and the Commission's rules make clear that carriers taking unbundled local switching have the right to use the incumbent LEC's entire interoffice network on a cost based, nondiscriminatory basis to complete local calls. WorldCom asserts that several incumbent LECs, such as NYNEX and Bell Atlantic, have made this form of transport available.[29]

11. Ameritech argues that the network element "interoffice transport" must be unbundled from switching and must be a discrete facility or piece of equipment used in the provision of telecommunications services.[30] Ameritech contends that the Commission's requirement to provide unbundled shared interoffice facilities means that requesting carriers have the option of sharing

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[27] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 28, 1997 (AT&T Jan. 28 *Ex Parte*). *...iting Local Competition Order*, 11 FCC Rcd at 15633, 15631, paras. 262, 258; Letter from Leonard S. Sawicki, Director FCC Affairs, MCI, to William F. Caton, Acting Secretary, FCC, June 17, 1997 (MCI June 17 *Ex Parte*).

[28] AT&T Jan. 28 *Ex Parte*.

[29] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, Apr. 16, 1997 (WorldCom Apr. 16 *Ex Parte*).

[30] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 23, 1997 (Ameritech May 23 *Ex Parte*). *See also* Letter from Cyndie Eby, Executive Director - Federal Regulatory, US West, Inc., to William F. Caton, Acting Secretary, FCC, Feb. 27, 1997 (US West Feb. 27 *Ex Parte*) (a network element is a facility that is dedicated to the exclusive use of a lawful interconnector).

dedicated interoffice facilities by subdividing those facilities among themselves, but that requesting carriers do not have the right to share the links used to transport Ameritech's own traffic.[31] Ameritech claims that unbundled transport can be provided in two ways: (1) dedicated transport, which is a discrete network element used exclusively by a single carrier and billed to that carrier; and (2) shared transport, which is a discrete network element jointly used by two or more requesting carriers, with the bill being pro-rated as directed by sharers.[32] Ameritech contends that, although requesting carriers may have the option of combining unbundled network elements, the definition of the term "network element" requires that the element must be able to be used separate from the rest of the incumbent LEC's network or facilities.[33]

12. Several incumbent LECs argue that the competitive carriers' definition of shared transport is inconsistent with the definition of an unbundled network element. Ameritech and BellSouth argue that shared transport, as proposed by competitive carriers, constitutes a service rather than an unbundled element.[34] According to Ameritech, such a definition bundles two elements -- transport and switching.[35] Ameritech also argues that the competitive carriers' position is contrary to the basic concept of unbundled network elements because unbundled elements are billed on a per facility/per month basis, which is consistent with the purchase of facilities as opposed to services.[36] Ameritech contends

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[31] Ameritech Opposition at 8-9.

[32] Ameritech Jan. 28 *Ex Parte*.

[33] Ameritech Opposition at 7-8.

[34] Ameritech Opposition at 7; BellSouth Opposition at 5. *See also* Bell Atlantic Opposition at 20 (the Commission's unbundled rules require services to be unbundled into separate network elements).

[35] Ameritech Opposition at 7.

[36] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Feb. 3, 1997 (Ameritech Feb. 3 *Ex Parte*).

that competitive LECs are requesting "common transport" service rather than the network element "shared transport." Ameritech claims that the term "common transport" is used to describe basic network connectivity, where incumbent LECs are responsible for transporting the call to the destination. Ameritech contends that it is currently offering "common transport" service as switched access service and wholesale usage service. Ameritech argues that these services are not network elements; rather, the switched access and wholesale usage services use many separate components of the existing public switched network in combination. Ameritech claims that "common transport" is thus inextricably intertwined with switching, and is not "transport unbundled from switching."[37] Ameritech also argues that the Commission's rules applicable to the provision of unbundled switching only require that incumbent LECs offer the features "the switch is capable of providing."[38] Ameritech claims that the switch does not include the routing instructions, which are a proprietary product of Ameritech, and are not a feature of the switch.[39]

13. Ameritech contends that competitive LECs are trying to "game" the statutory pricing scheme by attempting to purchase minutes of use of Ameritech's entire network, as opposed to a specific transport facility within the network. According to Ameritech, competitive carriers would thus be able to purchase unbundled elements while avoiding the concomitant risk that the leased facility will be underutilized. This, according to Ameritech, is contrary to the FCC's intent.[40] Bell Atlantic contends that

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[37] Ameritech Jan. 28 *Ex Parte*.

[38] Letter From James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 9, 1997 (Ameritech May 9 *Ex Parte*) attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 6-7 (Gebhardt Supplemental Rebuttal Testimony).

[39] Gebhardt Supplemental Rebuttal Testimony at 6.

[40] Ameritech Feb. 3 *Ex Parte*, *citing Local Competition Order*, FCC Rcd at 15668-69, para. 334. *See also* Ameritech Opposition at 7-8 (citing the Commission's statement that carriers purchasing network

WorldCom is requesting a single usage-sensitive rate for both dedicated and tandem switched transport. Bell Atlantic opposes this request on the ground that it seeks reinstatement of the "equal charge per unit of traffic" rule[41] that the Commission abandoned years ago.[42] BellSouth claims that per minute-of-use pricing for shared transport would be inconsistent with the 1996 Act because, pursuant to Section 252(d)(1), pricing for an unbundled element shall be "based on the cost . . . of providing" the element.[43] BellSouth contends that the "common" transport option that WorldCom requests would consist of "common" transport between an incumbent LEC's local end office and tandem plus dedicated transport between the incumbent LEC's tandems and the serving wire center. BellSouth argues that the costs of the dedicated

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elements by definition face a greater risk than a reseller but under WorldCom's proposal, requesting carriers assume no additional risk).

[41] The "equal charge per unit of traffic rule" was established in the Modification of Final Judgment (MFJ) in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub. nom., Maryland v. United States*, 103 S. Ct. 1240 (1983). The rule required that until Sept. 1, 1991:

> Charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers.

MFJ, Appendix B, Section B.

[42] Bell Atlantic Opposition at 20; Bell Atlantic Reply at 10. Bell Atlantic claims, however, that, if WorldCom seeks merely to route *local calls* made by customers of competitive carriers that purchase unbundled switching over the incumbent's network in common with local calls made by customers of the incumbent, then Bell Atlantic is willing to provide such transport and will route competitive carrier's local calls between offices exactly the way Bell Atlantic routes its own local calls. Bell Atlantic Reply at 10.

[43] BellSouth Reply at 6, *citing* 47 U.S.C. § 252(d)(1).

transport are not usage-sensitive.[44] In addition, several incumbent LECs object to WorldCom's petition on the ground that it would enable requesting carriers, in effect, to obtain access service without having to pay access charges.[45]

14. AT&T contends that Ameritech's proposal for "shared transport" is merely dedicated transport with a billing option that would enable carriers to resell portions of the dedicated transport and have Ameritech act as the billing agent.[46] AT&T argues that shared transport, as defined by Ameritech, would not provide a viable transport option for competitive carriers. AT&T claims that competitive carriers cannot properly engineer a transport network because they do not have access to data about existing traffic patterns and levels. Consequently, AT&T alleges that, under Ameritech's shared transport proposal, competitive carriers will be forced to route their traffic to tandems even when it would be more efficient to route such traffic directly to end offices. AT&T claims that this will lead to poor utilization of incumbent LEC interoffice transport facilities and will require the inefficient deployment of additional transport facilities between incumbent LEC end offices and the tandems.[47] AT&T also argues that usage sensitive pricing for shared use of interoffice transport facilities is consistent with other network elements such as unbundled switching, tandem switching, signalling, and call related databases, which are either partly or entirely priced on a per minute-of-use or per query basis.[48] In contrast to Ameritech's position regarding the routing table, NYNEX claims that the shared transport

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[44] BellSouth Reply at 6.

[45] Ameritech Opposition at 7; USTA Opposition at 16-17; LECC Reply at 9.

[46] AT&T Jan. 28 *Ex Parte*.

[47] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Dec. 12, 1996 (AT&T Dec. 12 *Ex Parte*).

[48] AT&T Jan. 28 *Ex Parte*. *See also* WorldCom May 21 *Ex Parte*.

unbundled element being offered by NYNEX allows competing carriers to use the same end office routing tables and functions that are used by NYNEX to route its own traffic.[49] Also, WorldCom claims that, when a carrier purchases unbundled local switching, it purchases all "features and functions, including functions integral to call routing" including the routing table.[50]

15. MCI and AT&T assert that the per minute-of-use option for shared transport is critical when providing local exchange service via unbundled local switching.[51] AT&T states that the Commission, in the *Local Competition Order*, recognized that the unbundling requirements of the 1996 Act provided competitive carriers with the opportunity to share the economies of scale and scope of the incumbent LEC. AT&T contends that access to shared transport on a cost-based, per minute-of-use basis is critical to preserving such scale and scope economies for competitive carriers.[52] MCI claims that competing carriers will need access to unbundled local switching and shared transport in less densely

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[49] Letter from G. R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997 (NYNEX July 18 *Ex parte*).

[50] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 21, 1997 (WorldCom May 21 *Ex parte*) attaching Surrebuttal Testimony of Joseph Gillan at 16. (Gillan Surrebuttal Testimony). *See also* WorldCom Opposition at 3 (shared transport is necessary to permit a requesting carrier using the local switching element to use the same routing options for its local traffic that the incumbent LEC uses for its own traffic).

[51] MCI June 17 *Ex Parte*; AT&T Jan. 25 *Ex Parte*.

[52] AT&T Jan. 28 *Ex Parte*, *citing Local Competition Order*, 11 FCC Rcd at 15508-09, para. 11 ("incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly . . . [t]he local competition provisions of the [1996] Act require that these economies be shared with entrants"); *Id.* at 15624, para. 242 ("National requirements for unbundled elements will allow new entrants . . . seeking to enter local markets on a national or regional scale to take advantage of economies of scale in the network design").

populated areas, because they are likely to build their own facilities early on only in urban centers. MCI contends that transport thus needs to be priced on a per minute-of-use basis because, in less densely populated areas, new entrants may have insufficient customer volume to justify flat-rated, dedicated transport.[53] MCI notes that other incumbent LECs, including NYNEX and BellSouth, are offering shared transport on a per minute-of-use basis.[54] MCI further notes that Ameritech's proposed non-recurring charges associated with Ameritech's shared and dedicated transport make the use of flat-rated shared and dedicated facilities even more uneconomic.[55] MCI contends that in Illinois Ameritech, in connection with its unbundled local switching proposal, is attempting to impose monthly trunk port charges of $147.56 for each digital trunk port and a nonrecurring charge of $729.39 for each trunk port. MCI claims that, if Ameritech is successful in forcing new entrants to use dedicated trunking in connection with unbundled local switching at these rates, there is little likelihood that use of unbundled local switching will be a viable entry strategy where traffic volumes do not justify flat-rated transport.[56]

16. AT&T and WorldCom also argue that, contrary to Ameritech's contention, defining shared transport consistent with the competitive carriers' interpretation would not eliminate the difference between resale and unbundled elements.[57] AT&T claims

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[53] MCI June 17 *Ex Parte*. AT&T claims that competitive carriers will not have the volume of traffic to justify purchasing dedicated transport. Letter from Judy Argentieri, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 6, 1997 (AT&T Jan. 6 *Ex Parte*). *Accord* WorldCom Apr. 16 *Ex Parte*; CompTel Opposition at 2-3 (a usage option for tandem-switched transport is necessary to prevent harmful discrimination against new entrants who must rely upon tandem-switched transport compared with larger carriers whose traffic volumes justify purchasing dedicated transport).

[54] MCI June 17 *Ex Parte*.

[55] MCI June 17 *Ex Parte*.

[56] MCI June 17 *Ex Parte*.

[57] Letter from Bruce K. Cox, Government Affairs Director,

that the Commission, in the *Local Competition Order*, identified three differences between the purchase of unbundled elements and resale, and all three differences continue to be valid.[58]

17. WorldCom contends that the Act and the Commission's rules make clear that the requesting carrier, purchasing unbundled local switching, is the sole provider of the local switching portion of interexchange access, regardless of the method of transport chosen by the interexchange carrier (IXC) to reach the unbundled local switch.[59] WorldCom suggests that NYNEX and Bell Atlantic do not contest this.[60] AT&T contends that, when a requesting carrier purchases the unbundled local switch and the unbundled

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AT&T, to William F. Caton, Acting Secretary, FCC, May 14, 1996 (AT&T May 14 *Ex Parte*); Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 23, 1997 (WorldCom May 23 *Ex parte*).

[58] AT&T May 14 *Ex Parte*. First, according to AT&T, network element purchasers bear the risk if elements, such as the loop and the switch, are not profitably utilized by customers. Carriers purchasing end-to-end rebundled unbundled elements face the risk that their users will generate substantial switch usage costs on local calls (free usage), without generating significant interLATA traffic and associated revenue. Second, competitive carriers buying the end-to-end unbundled elements can use their elements to create services the incumbent does not offer, and thus increase competitive options to consumers. Finally, use of rebundled unbundled network elements fosters the growth of facilities-based competition because competitors can gradually introduce their own facilities in place of elements purchased from incumbents. AT&T contends that most large competitive carriers would prefer to own their own networks because it reduces their vulnerability to discrimination by the incumbent, and gives them greater control over their costs, network quality, and ability to provide new services in response to consumer demand. *Id*. *See also* WorldCom May 23 *Ex Parte* (combinations of network elements provide new entrants an entirely different competitive entry strategy than resale. Such combinations of network elements permit new entrants the opportunity to provide new service and price pressures on incumbent LECs).

[59] WorldCom Apr. 16 *Ex Parte*.

[60] WorldCom Apr. 16 *Ex Parte*.

loop, that requesting carrier is entitled to bill an IXC for the access services associated with those unbundled network elements when the competitive carrier's local customer initiates or receives an interexchange call carried by that IXC. AT&T also claims that the requesting carrier has the right to offer transport services to the IXC; it is, however, the IXC's decision as to which carrier it uses to provide access transport services.[61]

18. Responding to LECC's petition, WorldCom argues that, by tying the provision of shared transmission facilities to both local switching and tandem capabilities, the clarification sought by LECC is overbroad and would unnecessarily constrain the ability of requesting carriers to purchase access to shared transmission facilities between two end offices as a network element.[62] WorldCom further contends that such a transport regime would require that each requesting carrier that purchases dedicated trunks between end offices establish customized routing using new line class codes. According to WorldCom, this would lead to rapid line class code exhaustion.[63]

III. DISCUSSION

19. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit affirmed in part and vacated in part the Commission's *Local Competition Order*. We note, as a predicate to our discussion below, that the court affirmed the Commission's rulemaking authority to identify unbundled network elements. The court held that section 251(d)(2) of the Act expressly gave the

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[61] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, filed July 11, 1997.

[62] WorldCom Opposition at 3-5 (network cost and efficiency of both the incumbent and the requesting carrier would suffer because additional and unnecessary dedicated trunk groups would have to be created, raising the costs for competitors, and the incumbent's own trunk groups would operate less efficiently as new entrant's traffic is removed from trunk groups already sized to handle this traffic load).

[63] WorldCom Opposition at 5.

Commission jurisdiction in this area.[64] We thus conclude that the Commission has authority to address, in this reconsideration order, the issues raised by petitioners concerning the extent to which "shared transport" should be provided as an unbundled element.

20. WorldCom filed a petition for clarification, and LECC filed a petition for reconsideration of the *Local Competition Order*; both petitions concerned the definition of shared transport as an unbundled network element. WorldCom filed a petition for clarification pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, which set forth rules regarding petitions for reconsideration. In its petition WorldCom also stated that, "[s]hould the Commission not regard this petition as a request for clarification of the *Local Competition Order*, WorldCom requests that it be regarded as a petition for reconsideration."[65] We believe WorldCom's filing is more properly addressed as a petition for reconsideration, and treat it as such in this decision.

21. Parties disagree about what we required in the *Local Competition Order* with respect to shared transport. In addition, parties ask us to clarify or reconsider our decision regarding the provision of shared transport under section 251(c)(3). We first restate what we required in the *Local Competition Order*, and then reconsider certain aspects that may have been unclear or that were not addressed in the *Local Competition Order*. We then respond to arguments raised by parties that advocate a different approach to the provision of shared transport than our rules require.

22. We believe that the petitions for reconsideration have raised reasonable questions about the scope and nature of an incumbent LEC's obligation to offer shared transport as an unbundled network element, pursuant to section 251(c)(3) and our implementing regulations. We address these issues below. We also believe, however, some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the *Local Competition Order*, we expressly required incumbent LECs to provide access

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[64] *Iowa Utilities Bd.* at *32, n.10.

[65] WorldCom Petition at 1, fn 1.

to transport facilities "shared by more than one customer or carrier."[66] The term "carrier" includes both an incumbent LEC as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the *Local Competition Order* encompasses a facility that is shared by multiple carriers, including the incumbent LEC. We recognize that the *Local Competition Order* did not explicitly state that an incumbent LEC must provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same facilities that an incumbent LEC uses for its traffic. We find, however, that a fair reading of our order and rules does not support the claim advanced by Ameritech that a shared network element necessarily is shared only among competitive carriers and is separate from the facility used by the incumbent LEC for its own traffic. Indeed, only Ameritech and US West suggest that the *Local Competition Order* could be interpreted to require sharing only between multiple competitive carriers.[67] Moreover, the fact that we required incumbent LECs to provide access to other network elements, such as signalling, databases, and the local switch, which are shared among requesting carriers and incumbent LECs is consistent with our view that transport facilities "shared by more than one customer or carrier" must be shared between the incumbent LECs and requesting carriers. Furthermore, with respect to local switching, we expressly rejected, in the *Local Competition Order*, a proposal that incumbent LECs could, or were required to, partition local switches before providing requesting carriers access to incumbent LEC switches under section 251(c)(3). We stated that "[t]he requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commentators."[68] We thus required that shared portions of incumbent LEC switches would be shared by all carriers, including the incumbent LEC. Although we do not believe that the *Local*

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[66] 47 C.F.R. § 51.319(d)(2)(i).

[67] *See* Ameritech Jan. 28. *Ex Parte*; US West Feb. 27 *Ex Parte*.

[68] *Local Competition Order*, 11 FCC Rcd at 15708, para. 416.

Competition Order was unclear as to this aspect of an incumbent LEC's obligation to provide shared transport, we take this opportunity to state explicitly that the *Local Competition Order* requires incumbent LECs to offer requesting carriers access, on a shared basis, to the same interoffice transport facilities that the incumbent uses for its own traffic.

23. We also conclude that the *Local Competition Order* was not ambiguous as to an incumbent LEC's obligation to offer access to the routing table resident in the local switch to requesting carriers that purchase access to the unbundled local switch.[69] The *Local Competition Order* made clear that requesting carriers that purchase access to the unbundled local switch may obtain customized routing, unless it is not technically feasible to provide customized routing from that switch. In those instances, a requesting carrier is limited to using the routing instructions in the incumbent LEC's routing table.[70] In so holding, we necessarily accepted the view that requesting carriers that take unbundled local switching have access to the incumbent LEC's routing table, resident in the switch. We find nothing in the *Local Competition Order* that supports the contention that requesting carriers that obtain access to unbundled local switching, pursuant to section 251(c)(3), do not obtain access to the routing table in the unbundled local switch.

24. The *Local Competition Order* did not clearly define certain aspects of incumbent LECs' obligation to provide access to shared transport under section 251(c)(3). In particular, we did not clearly and unambiguously (1) identify all portions of the network to which incumbent LEC must provide interoffice transport facilities on a shared basis; and (2) address whether requesting carriers may use shared transport facilities to provide exchange

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[69] Both end office and tandem switches contain routing tables, which provide information about how to route each call. The routing instructions notify the switch as to which trunks are to be used in transporting a call. Depending upon the availability of circuits, a call may be routed directly from the end office of the calling party to the called party's end office, or routed through a tandem switch.

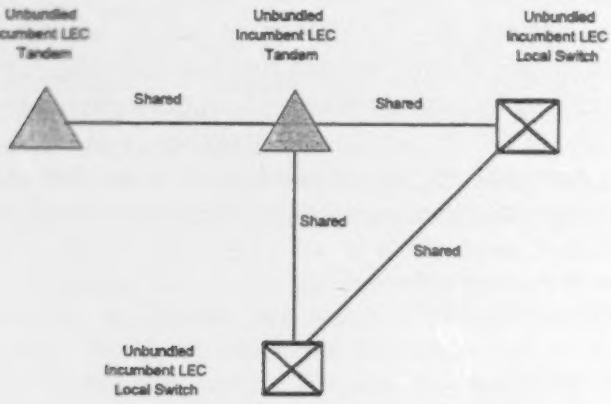
[70] *Local Competition Order*, 11 FCC Rcd at 15706, para. 412.

access service to IXCs for access to customers to whom they also provide local exchange service. We do so here on reconsideration.

A. Incumbent LECs' obligation regarding shared transport

25. We conclude that the obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and tandem. Thus, incumbent LECs are required to provide shared transport between end offices, between tandems, and between tandems and end offices).[71]

Diagram 1



26. The *Local Competition Order* expressly required "incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch."[72] Parties disagree, however, about whether incumbent

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[71] *See* Diagram 1.

[72] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. The Commission also stated in its rules that shared transmission facilities must be made available between "tandem switches and end offices." 47

LECs are required to provide shared transport between end offices. As noted above,[73] there is a discrepancy between the rule that establishes the general obligation to provide shared transport as a network element, and the rule vacated by the court that purports to establish the pricing standard for shared transport.[74] To the extent that incumbent LECs already have transport facilities between end offices, and between tandems, the routing table contained in the switch most likely would route calls between such switches.[75] We therefore conclude that there is no basis for limiting the use of shared transport facilities to links between end office switches and tandem switches. Limiting the definition of shared transport in this manner would not permit requesting carriers to utilize the routing tables in the incumbent LECs' switches. To the contrary, such a limitation effectively would require a requesting carrier to design its own customized routing table, in order to avoid having its traffic transported over the same interoffice facilities, connecting end offices, that the incumbent LEC use to transport its own interoffice traffic. Moreover, in the *Local Competition Order*, we held that it is technically feasible to provide access to interoffice transport facilities between end offices and between end offices and tandem switches.[76] No new evidence has been presented in this proceeding to convince us that our earlier conclusion regarding technical feasibility was incorrect.[77]

C.F.R. § 51.509(d).

[73] *See supra* para. 9.

[74] 47 C.F.R. §§ 51.319(d) and 51.509(d). We note that the Eighth Circuit has held that the Commission lacked jurisdiction to adopt the pricing standard set forth in section 51.509(d), and accordingly vacated that section of the Commission's rules.

[75] In fact, incumbent LECs would have to *modify* their routing tables in order to prevent calls from being routed between end offices or between tandems.

[76] *Local Competition Order*, 11 FCC Rcd at 15719, paras. 442 and 443.

[77] Among incumbent LECs, only Ameritech, in various *ex parte*

27. We further clarify in this order that incumbent LECs are only required to offer *dedicated* transport between their switches, or serving wire centers, and requesting carriers' switches. Our *Local Competition Order* was not absolutely clear as to whether incumbent LECs must provide dedicated or shared interoffice transport between incumbent LEC switches, or serving wire centers, and switches owned by requesting carriers. In the *Local Competition Order*, we required incumbent LECs to "provide access to *dedicated transmission facilities* between LEC central

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submissions, asserts that its switches are unable to "provide precise usage data or originating carrier identity for terminating local usage, or to identify terminating access usage with the called number." In essence, Ameritech contends that it is unable to accurately bill for the use of shared transport, including exchange access. Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1997 (Ameritech July 15 *Ex Parte*) attaching Reply Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 22-23 (Ameritech 271 Michigan Application Reply). As we held in our *Local Competition Order*, however, a determination of technical feasibility does not include consideration of billing concerns. 47 C.F.R. §51.5. *Accord Iowa Utilities Bd.* at *21. Moreover, as noted above, Ameritech is the only party to contend that it is not currently able to measure and bill for shared transport. In contrast, Bell Atlantic, NYNEX, and PacTel have stated that they offer shared transport in conjunction with unbundled local switching. Letter from Patricia E. Koch, Assistent Vice President - Government Relations - FCC, Bell Atlantic, to William F. Caton, Acting Secretary, FCC, August 4, 1997. Letter from G.R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997; Letter from M.E. Garber, Senior Counsel, Pacific Telesis, to William F. Caton, Acting Secretary, FCC, Mar. 3, 1997. In any event, we note that Ameritech has stated in another proceeding that it has proposed a settlement mechanism as an interim solution until it develops a long-term solution. Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 22. Ameritech has also stated that it "is operationally capable of furnishing the 'platform' (unbundled local switching and shared transport) upon request." Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 23. We thus find no evidence that it is not technically feasible to provide shared transport.

offices or between end offices and those of competing carriers."[78] This could be read to suggest that incumbent LECs are only required to provide dedicated (but not shared) interoffice transport facilities between their end offices, or serving wire centers, and points in the requesting carrier's network. The rule that defines interoffice transmission facilities, however, is less clear, and could be read to require incumbent LECs to provide shared transport between incumbent LECs' switches, or serving wire centers, and requesting carriers' switches.[79]

28. We therefore clarify here that incumbent LECs must offer only *dedicated transport*, and not shared transport, between their switches, or serving wire centers, and requesting carriers' switches, as set forth in the *Local Competition Order*. We also note that the *Local Competition Order* expressly limited the requirement to provide unbundled interoffice transport facilities to *existing* incumbent LEC facilities.[80]

29. On reconsideration, we further clarify that incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers.[81] We stated

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[78] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440 (emphasis added).

[79] 47 C.F.R. 51.319(d)(1) states:

> Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

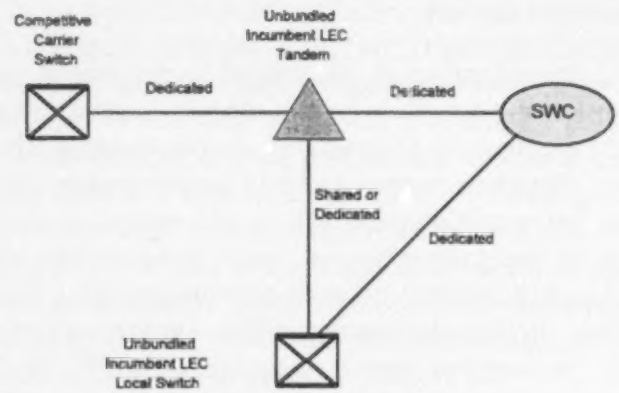
47 C.F.R. 51.319(d)(1).

[80] *Local Competition Order*, 11 FCC Rcd at 15722, para. 451.

[81] We note that this clarification finds some support in the *Local Competition Order*, where we concluded that: "[t]his requirement [that incumbent LECs provide access to dedicated transmission facilities]

above that shared transport must be provided between incumbent LEC switches. Serving wire centers are merely points of demarcation in the incumbent LEC's network, and are not points at which traffic is switched. Traffic routed to a serving wire center is traffic dedicated to a particular carrier. We thus conclude that unbundled access to the transport links between incumbent LEC switches and serving wire centers must only be provided by incumbent LECs on a *dedicated* basis.[82]

Diagram 2



30. Finally, we note that, traditionally, shared facilities are priced on a usage-sensitive basis, and dedicated facilities are priced on a flat-rated basis. We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities. For example, in the *Access Charge Reform Order*, specifically the sections dealing with rate structure issues for interstate access charges, we required that the cost of switching, a shared facility, be recovered on a per

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includes, at a minimum, interoffice facilities between end offices and serving wire centers . . ." *Local Competition Order* at 15718, para 440.

[82] *See* Diagram 2.

minute of use basis, while the cost of entrance facilities, which are dedicated to a single interexchange carrier, be recovered on a flat-rated basis.[83] We note that several state commissions, in proceedings conducted pursuant to section 252 of the Act, have required incumbent LECs to offer shared transport priced on a usage-sensitive basis.[84] We acknowledge that, under the Eighth Circuit's decision, we may not establish pricing rules for shared transport. However, in situations where the Commission is required to arbitrate interconnection agreements pursuant to subsection 252(e)(5), we intend to establish usage-sensitive rates for recovery of shared transport costs unless parties demonstrate otherwise.[85]

B. Application of the requirements of section 251(d)(2) to shared transport

31. Shared transport, as defined in this order, satisfies the two-prong test set forth in section 251(d)(2) of the Act. Section 251(d)(2) requires the Commission, in determining what network elements should be made available under section 251(c)(3), to consider "at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[86] In the *Local Competition Order*, we held that an incumbent could refuse to

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[83] Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May, 16, 1997) (*Access Charge Reform Order*) at paras. 135, 153.

[84] *See, e.g.*, Michigan Public Service Commission, Case No. U-11280, July 14, 1997, Order at 26; Public Service Commission of Wisconsin, Case No. 6720-TI-120, Findings of Fact, Conclusions of Law, and Second Order, May 30, 1997.

[85] *See* 47 U.S.C. § 252(e)(5). *See also Local Competition Order*, 11 FCC Rcd at 16127-32, paras. 1283-95 (giving notice of certain minimum procedural rules and substantive standards that the Commission will use if it assumes jurisdiction pursuant to section 252(e)(5)).

[86] 47 U.S.C. § 251(d)(2).

provide access to a network element pursuant to section 251(d)(2) only if the incumbent LEC demonstrated that "the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service."[87] We further held that, under section 251(d)(2)(B), we must consider "whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[88] The Eighth Circuit affirmed the Commission's interpretation of section 251(d)(2).[89]

32. In the *Local Competition Order*, we concluded that, with respect to transport facilities, "the record provides no basis for withholding these facilities from competitors based on proprietary considerations."[90] We also concluded that section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities.[91] With respect to the unbundled local switch, we held that, even assuming that switching may be proprietary, at least in some respects, "access to unbundled local switching is clearly 'necessary' under our interpretation of section 251(d)(2)(A)."[92] We also concluded that a requesting

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[87] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. *See also id.* at 15642, para. 283.

[88] *Local Competition Order*, 11 FCC Rcd at 15643, para. 285.

[89] *Iowa Utilities Bd. v. FCC*, at *22-24.

[90] *Local Competition Order*, 11 FCC Rcd at 15720, para. 446.

[91] *Local Competition Order*, 11 FCC Rcd at 15720-21, para. 447.

[92] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. In the *Local Competition Order*, we defined "necessary" in this specific context as meaning "that an element is a prerequisite for competition." *Id.* at para. 282. We also note that the Eighth Circuit affirmed this definition. *Iowa Utilities Bd.* at *22-23.

carrier's ability to offer local exchange service would be "impaired, if not thwarted," without access to the unbundled local switch, and therefore, that section 251(d)(2)(B) requires incumbent LECs to provide access to the unbundled local switch.[93]

33. Upon reconsideration, we herein affirm that incumbent LECs are obligated under section 251(d)(2) to provide access to shared transport, as we here define it, as an unbundled network element. Parties in the record have not contended that interoffice transport facilities are proprietary, and we have no basis for modifying our prior conclusion that interoffice transport facilities are not proprietary. Thus, there is no basis under section 251(d)(2)(A) for incumbent LECs to refuse to provide interoffice transport facilities on a shared as well as a dedicated basis.

34. We also note that the failure of an incumbent LEC to provide access to all of its interoffice transport facilities on a shared basis would significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market. In the *Local Competition Order*, we observed that:

> By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase *all* interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.[94]

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[93] *Local Competition Order*, 11 FCC Rcd at 15710-11, para. 420.

[94] *Local Competition Order*, 11 FCC Rcd at 15718-19, para. 441 (emphasis added).

We continue to find the foregoing statements to be true with respect to shared as well as dedicated transport facilities. Requesting carriers should have the opportunity to use *all* of the incumbent LEC's interoffice transport facilities. Moreover, the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.

35. We believe that access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns. Moreover, requiring competitive carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates. In addition, new entrants would be hindered by significant transaction costs if they were required to continually reconfigure the unbundled transport elements as they acquired customers. We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers. Further, if new entrants were forced to rely on dedicated transport facilities, even at the earliest stages of competitive entry, they would almost inevitably miscalculate the capacity or routing patterns. We recognize, however, that the need for access to all of the incumbent LEC's interoffice facilities on a shared basis may decrease as competitive carriers expand their customer base and have an opportunity to identify traffic volumes and call routing patterns. We therefore may revisit at a later date whether incumbent LECs continue to have an obligation, under section 251(d)(2), to provide access to all of their interoffice transmission facilities on a shared, usage sensitive basis.[95]

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[95] We note that, if, in the future, competitive carriers gain sufficient market penetration to justify obtaining dedicated transport facilities, either through the use of unbundled elements or through building their facilities, shared transport may no longer meet the section 251(d)(2) requirements. In that event, the Commission can evaluate at that time whether incumbent LECs must continue to provide access to

36. As noted above, although interoffice transport, as we define the element pursuant to section 251(c)(3), refers to the transport links in the incumbent LEC's network, access to those links on a shared basis effectively requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch. Ameritech contends that the routing table contained in the switch, which is used in conjunction with shared transport, is proprietary. Ameritech and other incumbent LECs further allege that requesting carriers may obtain the functional equivalent of shared transport either by purchasing transport as an access service, or by purchasing dedicated transport facilities. These parties thus contend that, under section 251(d)(2)(A), incumbent LECs are not required to provide shared transport (including use of the routing table contained in the switch) as a network element.

37. Issues regarding intellectual property rights associated with network elements are before us in a separate proceeding.[96] For purposes of this Order only, we therefore assume without deciding that the routing table is proprietary. We nevertheless conclude that section 251(d)(2) requires an incumbent LEC to provide access to both its interoffice transmission facilities and to the routing tables contained in the incumbent LEC's switches.[97] We affirm our finding in the *Local Competition Order* that transport provided as part of access service, or as a wholesale usage service, is not a viable substitute for shared transport as a network element.[98] All incumbent LECs are not required to offer transport as an access service on a stand alone basis. Only Class A carriers are required, under our *Expanded Interconnection* rules,

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shared transport as a network element.

[96] *See* MCI Petition for Declaratory Ruling, CC Docket No. 96-98, CCB Pol. 97-4 (Mar. 11, 1997).

[97] The Eighth Circuit recognized that "the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature." *Iowa Utilities Bd.* at *32, n.37.

[98] *See Local Competition Order*, 11 FCC Rcd at 15721, para. 448.

to unbundle interstate transport service.[99] Moreover, transport service that incumbents offer under the *Expanded Interconnection* tariffs may include only interstate transport facilities (transport provided either via a tandem switch or direct trunked between a local switch and the serving wire center), not interoffice transport facilities directly connecting two local switches. In the *Local Competition Order*, moreover, we expressly rejected the suggestion that requesting carriers "are not impaired in their ability to provide a service . . . if they can provide the proposed service by purchasing the service at wholesale rates from a LEC."[100]

C. Use of shared transport facilities to provide exchange access service

38. In this order on reconsideration, we clarify that requesting carriers that take shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service. We further clarify that, where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC.

39. In the *Local Competition Order*, we held that, if a requesting carrier purchases access to a network element in order to provide local exchange service, the carrier may also use that element to provide exchange access and interexchange services.[101] We did not impose any restrictions on the types of

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[99] Class A carriers are those exchange carriers that have more than $100 million in total company regulated revenues. 47 C.F.R. §§ 32.11(a)(1), 32.9000.

[100] *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286. *See also id.* at 15644, para. 287. *See also Iowa Utilities Bd.* at *21 (stating that the fact that a capability may be available as a service does not necessarily preclude that capability from being available as a network element).

[101] *Local Competition Order*, 11 FCC Rcd at 15679, para. 356.

telecommunications services that could be provided over network elements. We did not specifically consider in the *Local Competition Order*, however, whether a requesting carrier may use interoffice transport to provide exchange access service. We conclude here that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.[102] We find that this is consistent with our initial decision.[103]

D. Response to Specific Arguments Raised by Parties

40. As discussed above, we define the unbundled network element of shared transport under section 251(c)(3) as interoffice transmission facilities, shared between the incumbent LEC and one or more requesting carriers or customers, that connect end office switches, end office switches and tandem switches, or tandem switches, in the incumbent LEC's network. We exclude from this definition interoffice transmission facilities that connect an incumbent LEC's switch and a requesting carrier's switch, and those connecting an incumbent LEC's end office switch, or tandem switch, and a serving wire center. This definition of shared transport assumes the interconnection point between the two carriers' networks, pursuant to section 251(c)(2), is at the incumbent LEC's switch. This definition is consistent with the statutory definition of network elements, which defines a network element as a facility or equipment used in the provision of a

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[102] We issue a further notice of proposed rulemaking below seeking comment on whether carriers may use dedicated and shared unbundled transport facilities to carry originating to, and terminating access traffic from, customer to whom the requesting carrier does not also provide local exchange service. *See infra* paras. 51-52.

[103] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15679, para. 356 (section 251(c)(3) permints interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services). *See also* NYNEX July 18 *Ex Parte* (recognizing that, when a requesting carrier "wins a local service customer," and uses an unbundled network element such as shared transport to serve that customer, that the carrier "is entitled to use that same element to provide other telecommunications services, such as exchange access, to IXCs.")

telecommunications service, including the features, functions, and capabilities provided by means of such facility or equipment.[104]

41. As an initial matter, we reject Ameritech's contention that, by definition, network elements must be partly or wholly dedicated to a customer.[105] To the contrary, we held in the *Local Competition Order* that some network elements, such as loops, are provided exclusively to one requesting carrier, and some network elements, such as interoffice transport provided on a shared basis, are provided on a minute-of-use basis and are shared with other carriers.[106] In the *Local Competition Order*, we also identified signalling, call-related databases, and the switch, as network elements that necessarily must be shared among the incumbent and multiple competing carriers.[107]

42. We also reject Ameritech's and BellSouth's contention that, because WorldCom and other requesting carriers seek access to an element -- shared transport -- that cannot be effectively disassociated from another element -- local switching, the requesting carriers are in fact seeking access to a bundled service rather than to transport as a network element unbundled from switching.[108] As previously discussed, several of the network elements we identified in the *Local Competition Order* depend, at least in part, on other network elements. In particular, although we identified the signalling network as a network element, the information necessary to utilize signalling networks resides in the switch, which we identified as a separate network element. In

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[104] 47 U.S.C. § 153(29).

[105] *See* Ameritech Reply at 19.

[106] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

[107] *See* 47 C.F.R. § 51.319(e). *See also Iowa Utilities Bd.* at *18 (affirming determination that signalling and databases are network elements).

[108] *See* Ameritech Opposition at 7 and Bell South Reply at 6. Ameritech also contends that incumbent LECs are not required to provide bundled services at cost-based rates under section 251(c)(3) and section 252(d)(1). *See* Ameritech Opposition at 7.

addition, we required incumbent LECs, upon request, to provide access to unbundled loops conditioned to provide, among other things, digital services such as ISDN, even though the equipment used to provide ISDN service typically resides in the local switch, rather than in the loop.[109] We thus find no basis for concluding that each network element must be functionally independent of other network elements.

43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or pre-identified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis.[110] We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.[111] Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs

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[109] *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

[110] *See generally Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

[111] *See* May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

to rebundle separate network elements,[112] the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."[113] Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[114] Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

45. We likewise reject Ameritech's contention that purchasing access to the switch as a network element does not entitle a carrier

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[112] *Iowa Utilities Bd.* at *25. *See also* 47 C.F.R. § 51.315(c)-(f) (vacated rules).

[113] *Iowa Utilities Bd.* at *28.

[114] 47 C.F.R. § 51.315(b).

to use the routing table located in that switch.[115] According to Ameritech, vendors provide switches that are capable of acting on routing instructions, but the switch itself does not include routing instructions; those instructions are added by the carrier after it purchases the switch from the vendor and are contained in a routing table resident in the switch. Ameritech asserts that its routing tables are proprietary products, and "are not a feature of the switch."[116] In the *Local Competition Order*, we determined that "we should not identify elements in rigid terms, but rather by function."[117] Routing is a critical and inseverable function of the local switch. One of the most essential features a switch performs is to provide routing information that sends a call to the appropriate destination. We find no support in the statute, the *Local Competition Order*, or our rules for Ameritech's assertion that the switch, as a network element, does not include access to the functionality provided by an incumbent LEC's routing table. In fact, the only question addressed in the *Local Competition Order* was whether requesting carriers could obtain *customized* routing, that is, routing different from the incumbent LEC's existing routing arrangements.[118]

46. We further find that access to unbundled switching is not necessarily limited to the product the incumbent LEC originally purchased from a vendor. As we noted in the *Local Competition Order*, incumbent LECs may in some instances be required to modify or condition a network element to accommodate a request under section 251(c)(3).[119] Moreover, we held that unbundled

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[115] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[116] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[117] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[118] *Local Competition Order*, 11 FCC Rcd at 15709, para. 418. We concluded that incumbent LECs must offer customized routing unless they prove to the state commission that doing so would not be technically feasible in a particular switch.

[119] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15692,

local switching includes access to the vertical features of the switch, regardless of whether the vertical features were included in the switch when it was purchased, or whether the vertical features were purchased separately from the vendor or developed by the incumbent.[120] We held that network elements include physical facilities "as well as logical features, functions, and capabilities that are provided by, *for example, software located in a physical facility such as a switch.*"[121] We also note that the Eighth Circuit affirmed the Commission's interpretation of the Act's definition of "network elements." The court stated that "the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B" and that the Act's definition explicitly made reference to "databases, signaling systems, and information sufficient for billing and collection."[122] Thus, just as databases and signaling systems may include software created by the incumbent LEC, which must be made available to competitive carriers purchasing those elements on an unbundled basis, we believe that the routing table created by the incumbent LEC that is resident in the switch must be made available to requesting carriers purchasing unbundled switching. Finally, we note that Ameritech is the only incumbent LEC that has argued in this record that the routing table is not included in the unbundled local switching element. Other incumbent LECs have stated that they offer shared transport in conjunction with unbundled local switching.[123] This suggests that other incumbent LECs recognize that the routing table is a feature, function, or capability of the switch.

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para. 382. This determination was specifically "endorsed" by the Eighth Circuit. *Iowa Utilities Bd.* at *32, n.33. *See also* 47 C.F.R. § 51.307.

[120] *See generally Local Competition Order*, 11 FCC Rcd at 15706, para. 412. *See also* 47 C.F.R. § 51.319(c)(1)(i)(C).

[121] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260 (emphasis added).

[122] *Iowa Utilities Bd.* at *20.

[123] *See* n.77 *supra*.

47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale.[124] A requesting carrier that takes a network element dedicated to that carrier, and recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.[125] In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.[126] Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.[127]

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[124] *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

[125] *Iowa Utilities Bd.* at *26-27.

[126] *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

[127] A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service

48. BellSouth's arguement, that assessing a usage-sensitive rate for shared transport would be inconsistent with the 1996 Act because it would not reflect the manner in which costs are incurred, is similarly unpersuasive. BellSouth's argument is premised on the assumption that incumbent LECs would be required to provide shared transport over facilities between the tandem switch and the serving wire center. In this order, however, we make clear that incumbent LECs are required to provide transport on a dedicated, but not on a shared basis, over transport facilities between the incumbent LEC's tandem and the serving wire center. Thus, BellSouth's concern is misplaced.

49. We also find that there is no element in the incumbent LEC's network that is an equivalent substitute for the routing table. We agree with Ameritech that requesting carriers could duplicate the shared transport network by purchasing dedicated facilities. But in that instance, requesting carriers would be forced to develop their own routing instructions, and would not be utilizing a portion of the incumbent LEC's network to substitute for the routing table. In the *Local Competition Order*, we specifically rejected the suggestion that an incumbent LEC is not required to provide a network element if a requesting carrier could obtain the element from a source other than the incumbent LEC.[128] The Eighth Circuit affirmed the Commission's conclusion.[129]

50. Furthermore, we find that, at this stage of competitive entry, limiting shared transport to dedicated transport facilities, as

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would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

[128] *Local Competition Order*, 11 FCC Rcd at 15643-44, paras. 286-87. We found that requiring incumbent LECs to provide an element only where it is unavailable from any other source would nullify section 251(c)(3) because any new entrant, theoretically, could duplicate the incumbent LEC's entire network. Congress recognized that such duplication could delay entry and might be inefficient.

[129] *Iowa Utilities Bd.* at *22.

Ameritech suggests, would impose unnecessary costs on new entrants without any corresponding, direct benefits. AT&T and Ameritech have both presented evidence regarding the costs of dedicated transport facilities linking every end office and tandem in an incumbent LEC's network as significant relative to the cost of "shared transport." For example, AT&T contends that the cost is $.041767 per minute for dedicated transport plus associated non-recurring charges (NRCs).[130] AT&T claims that Ameritech would charge a total of $5008.58 per DS1 (including administrative charges and connection charges) and $58,552.87 per switch (including customized routing and billing development).[131] AT&T argues that this compares with $.000776 per minute for unbundled shared transport.[132] Ameritech, on the other hand, contends the use of tandem routed dedicated facilities cost is $.0031148 per minute plus associated NRCs.[133] Ameritech claims that the nonrecurring charges per DS1 are $2769.27 (including administrative charges per order). Ameritech states that other NRCs include two trunk port connection charges ($770.29 initial, $29.16 subsequent), service ordering charge per occasion ($398.72 initial, $17.37 subsequent), billing development charge per switch ($35,328.87), custom routing charge, per line class code per switch ($232.24), and a service order charge ($398.73).[134] Nevertheless, under either AT&T's or Ameritech's cost calculations for dedicated transport, we conclude that the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.

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[130] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, March 20, 1997 (AT&T Mar. 20 *Ex Parte*).

[131] AT&T Mar. 20 *Ex Parte*.

[132] AT&T Mar. 20 *Ex Parte*.

[133] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Mar. 28, 1997 (Ameritech Mar. 28 *Ex Parte*).

[134] Ameritech Mar. 28 *Ex Parte*.

51. We also find that limiting shared transport to dedicated facilities, as defined by Ameritech, would be unduly burdensome for new entrants. First, we agree with MCI, AT&T, et al., that a new entrant may not have sufficient traffic volumes to justify the cost of dedicated transport facilities.[135] Second, a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess capacity relative to the incumbent LEC in order to provide the same level of service quality (i.e., same level of successful call attempts) as the incumbent LEC.[136] As a new entrant gains market share and increased traffic volumes for local service, however, the relative amount of excess capacity necessary to prevent blocking should decrease. We do not rule out the possibility, therefore, that, once new entrants have had a fair opportunity to enter the market and compete, we might reconsider incumbent LECs' obligations to provide access to the routing table.[137]

52. As discussed above, requesting carriers may use shared transport to provide exchange access service to customers for whom they also provide local exchange service. Several competing carriers contend that an interexchange carrier (IXC) has the right to select a requesting carrier that has purchased unbundled shared

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[135] *See* n. 53 *supra*.

[136] *See* William W. Sharkey, *The Theory of Natural Monopoly* 184-85, (1982) ("that for a given number of circuits the economies [of scale] are more pronounced at higher grades of service (lower blocking probability). The economics of scale, however, decline substantially as the number of circuits increases. *Therefore for small demands a fragmentation of the network could result in a significant cost penalty, because more circuits would be required to maintain the same grade of service. At larger demands the costs of fragmentation are less pronounced.*") (emphasis added).

[137] As we held in the *Local Competition Order*, "the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by section 251(c)(3), but they do not require us to do so." *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286.

transport to provide exchange access service.[138] The carriers further contend that, if the IXC selects a requesting carrier, rather than the incumbent LEC, as the exchange access provider, the competing carrier is entitled to bill the IXC for the access services associated with shared transport. We find that a requesting carrier may use shared transport facilities to provide exchange access service to originate or terminate traffic to its local exchange customers, regardless of whether the requesting carrier or another carrier is the IXC for that traffic. We further conclude that a requesting carrier that provides exchange access service to another carrier is entitled to assess access charges associated with the shared transport facilities used to transport the traffic. We believe that this necessarily follows from our decision in the *Local Competition Order*[139] where we stated that:

> [W]here new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to IXCs because the new entrants, rather

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[138] Letter from Bruce D. Cox, Government Affairs Vice President for AT&T, to William F. Caton, Acting Secretary, FCC, July 11, 1997; WorldCom June 27 *Ex Parte*.

[139] In the *Local Competition Order*, we adopted a limited, transitional plan to address public policy concerns raised by the potential for requesting carriers to bypass access charges through the use of unbundled network elements. *See Local Competition Order* at 15862-69, paras. 716-32. Our authority to adopt that interim plan generally was upheld in *Competitive Telecommunications Association v. FCC*, although the court noted that the Commission lacks authority to decide whether carriers are obligated to continue to pay intrastate access charges. *Competitive Telecommunications Association v. FCC*, 1997 WL 352284 (8th Cir. June 27, 1997) at *6, n.5. Outside the scope of that transitional plan, however, we held that parties that use network elements to provide interexchange or exchange access services are not required to pay access charges. *Local Competition Order*, 11 FCC Rcd at 15682, para. 363; *Access Charge Reform Order* at paras. 339-340.

> than the incumbents, will be providing exchange access services . . . .[140]

We therefore find that requesting carriers that provide exchange access using shared transport facilities to originate and terminate local exchange calls may also use those same facilities to provide exchange access service to the same customers to whom the requesting carrier is providing local exchange service. Requesting carriers are then entitled to assess access charges to interexchange carriers that use the shared transport facilities to originate and terminate traffic to the requesting carrier's customers.

E. Final Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA),[141] the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in its *Local Competition Order* in this proceeding.[142] None of the petitions for reconsideration filed in Docket No. 96-98 specifically address, or seek reconsideration of, that FRFA. This present Supplemental Final Regulatory Flexibility Analysis addresses the potential effect on small entities of the rules adopted pursuant to the *Third Order on Reconsideration* in this proceeding, *supra*. This Supplemental FRFA incorporates and adds to our FRFA.

54. *Need for and Objectives of this Third Order on Reconsideration and the Rules Adopted Herein.* The need for and objectives of the rules adopted in this *Third Order on Reconsideration* are the same as those discussed in the *Local Competition Order's* FRFA "Summary Analysis of Section V

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[140] *Local Competition Order*, 11 FCC Rcd at 15682, para. 363 n.772.

[141] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[142] *Local Competition Order*, 11 FCC Rcd at 16143-80, paras. 1324-441.

Access to Unbundled Network Elements."[143] In general, our rules adopted in Section V were intended to facilitate the statutory requirement that incumbent local exchange carriers (LECs) are required to provide nondiscriminatory access to unbundled network elements.[144] In this *Third Order on Reconsideration*, we grant in part and deny in part the petitions filed for reconsideration and/or clarification of the *Local Competition Order*, in order to further the same needs and objectives. We conclude that the duty of incumbent LECs to provide access to unbundled network elements also includes the provision of "shared transport" as an unbundled network element between end offices, even if tandem switching is not used to route the traffic. We also hold that the term "shared transport" refers to all transmission facilities connecting an incumbent LEC's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We conclude that incumbent LECs are obligated under Section 251(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(d)(2), to provide access to both their interoffice transmission facilities and their routing tables contained in the incumbent LEC's switches. Finally, we conclude that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.

55. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply*. In determining the small entities affected by our *Third Order on Reconsideration* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *Local Competition Order*.[145] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules we have adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern"

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[143] *Local Competition Order* at 16161, paras. 1374-1383.

[144] *Local Competition Order* at 16161, para. 1374.

[145] *See Local Competition Order* at 16149-57, paras. 1341-60.

under Section 3 of the Small Business Act.[146] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[147] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[148] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[149] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

56. In addition, for purposes of this Supplemental FRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *Local Competition Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service

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[146] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[147] 15 U.S.C. § 632.

[148] *Id.* (*citing* 13 C.F.R. § 121.201).

[149] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

firms or small incumbent LECs that might be affected.[150] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[151] Finally, we estimated that there were fewer than 30 small entity CAPs that would qualify as small business concerns.[152]

57. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of the rules adopted in the *Third Order on Reconsideration*, we require incumbent LECs to provide requesting carriers with access to the same shared transport for all transmission facilities connecting incumbent LECs' switches. No party to this proceeding has suggested that changes in the rules relating to access to unbundled network elements would affect small entities or small incumbent LECs. We determine that complying with this rule may require use of engineering, technical, operational, accounting, billing, and legal skills. For example, a new entrant may be required to combine its own interoffice facilities with those of the incumbent LEC, or be required to combine purchased unbundled network elements into a package unique to its own needs.

58. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[153] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *Local Competition Order*. As stated above, no petitioner has challenged this finding. We further find that our new rules, which clarify the definition of "shared transport," will

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[150] *Local Competition Order* at 16150, para. 1343.

[151] *Local Competition Order* at 16151, para. 1345.

[152] *Local Competition Order* at 16151, para. 1347.

[153] *Local Competition Order* at 16162, para 1376.

likely ensure that small entities obtain the unbundled elements that they request.

59. **Report to Congress**: The Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Third Order on Reconsideration* and this supplemental FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Discussion

60. In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements. In particular, we found that local loops are dedicated to the premises of a particular customer.[154] Therefore, we stated that a requesting carrier would need to provide all services requested by the customer to whom the local loops are dedicated, and that, as a practical matter, requesting carriers usually would need to provide local exchange service over any unbundled local loops that it purchases under section 251(c)(3).[155] We similarly held in our *Order on Reconsideration* that the unbundled switch, as defined in the *Local Competition Order*, includes the line card, which is typically dedicated to a particular customer. We concluded that:

> Thus, a carrier that purchases the unbundled switching element to serve an end user effectively obtains the

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[154] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[155] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

> exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user. A practical consequence of this determination is that the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.[156]

61. Neither of the petitions for reconsideration expressly asked the Commission to determine whether requesting carriers may purchase shared transport facilities under section 251(c)(3) of the Act to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.[157] Moreover, the oppositions and replies to the two petitions for reconsideration, as well as the *ex partes*, focused on the issue of whether requesting carriers may use unbundled shared transport facilities, in conjunction with unbundled switching, to compete in the local exchange market.[158] In fact, the issue of

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[156] *Order on Reconsideration*, 11 FCC Rcd at 13048, para. 11.

[157] *See, e.g.*, WorldCom Petition at 6 (new local entrants may need to use shared transport facilities between end offices as well as between an end office and a tandem); WorldCom Opposition at 4 (contending that requesting carriers that purchase unbundled local switching should be able to route calls over the same facilities the incumbent LEC uses to transport its traffic); LECC Petition at 33 ("the Order requires incumbent LECs to provide unbundled access to shared transmission facilities between end offices and tandem switches . . . [t]he Commission, however, should clarify that such shared transmission facilities may be provided to a requesting carrier only in conjunction with local switching and tandem capability).

[158] WorldCom April 16 *Ex Parte* (asserting that carriers that purchase unbundled local switching have the right to use incumbent LECs' interoffice transport facilities to complete local calls); AT&T Jan. 28 *Ex Parte* (noting that the Commission had held that carriers that seek to enter the local exchange market should be able to take advantage of the incumbent LEC's economies of scale); Bell Atlantic Reply at 10 (requesting carriers are entitled to purchase shared transport in conjunction with local switching to route local calls).

whether requesting carriers may purchase unbundled shared transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service was specifically addressed only in two recent *ex parte* submissions.[159] In order to develop a complete record on this issue, we issue this further notice of proposed rulemaking specifically asking whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Absent restrictions requiring carriers to provide local exchange service in order to purchase unbundled shared or dedicated transport facilities, an IXC, for example, could request shared or dedicated transport under section 251(c)(3) for purposes of carrying originating interstate toll traffic between an incumbent LEC's end office and the IXC's point of presence (POP). Likewise, an IXC could request such transport network elements for purposes of terminating interstate toll traffic from its POP to an incumbent LEC's end office. Parties that advocate the use of transport network elements for the transmission of such access traffic should address whether that approach is consistent with our *Order on Reconsideration* regarding the use of the unbundled local switching element to provide interstate access service[160] as well as recent appellate court decisions interpreting section 251(c)(2) and (3).[161] Parties that advocate restricting the use of transport network elements should address whether such restrictions are consistent with section 251(c)(3) of the Act, which requires an incumbent LEC to provide access to unbundled network elements "for the provision of a telecommunications service." Moreover, those parties should also address the technical feasibility of requiring an IXC to identify terminating toll traffic that is destined for customers that are not local exchange customers of the incumbent LEC.

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[159] WorldCom June 27 *Ex Parte*; NYNEX July 18 *Ex Parte*.

[160] *Order on Reconsideration*, 11 FCC Rcd at 13048-49, para. 12-13.

[161] *CompTel*, 11 F.3d at 1073-75; *Iowa Utilities Bd.* at n.20.

B. Procedural Matters

1. Ex Parte Presentations

62. This *Further Notice* is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[162]

2. Initial Regulatory Flexibility Analysis

63. As required by the Regulatory Flexibility Act (RFA),[163] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (*Further Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the Further Notice, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA, 5 U.S.C. § 603(a).

64. *Need for and Objectives of the Proposed Rules*. We seek comment on whether requesting carriers may use unbundled shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. We also seek comment on whether similar use restrictions may apply to the use of unbundled dedicated transport facilities. We propose no new rules at this time. In light of comments received in response to the *Further Notice*, we might issue new rules.

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[162] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[163] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

65. *Legal Basis*. The legal basis for any action that may be taken pursuant to the Further Notice is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r).

66. *Description and Estimate of the Number of Small Entities That May Be Affected by the Further Notice of Proposed Rulemaking*. In determining the small entities affected by our *Further Notice* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *First Report and Order*.[164] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[165] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[166] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[167] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from

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[164] *Local Competition Order*, 11 FCC Rcd at 16149-57, paras. 1341-60.

[165] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[166] 15 U.S.C. § 632.

[167] *Id.* (*citing* 13 C.F.R. § 121.201).

the definition of "small entity" and "small business concern."[168] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

67. In addition, for purposes of this IRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *First Report and Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[169] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[170] Finally, we estimated that there are fewer than 30 small entity CAPs that might qualify as small business concerns.[171]

68. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements*. It is probable that any rules issued pursuant to the *Further Notice* would not change the projected reporting, recordkeeping, or other compliance requirements already adopted in this proceeding.[172]

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[168] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

[169] *Local Competition Order* at 16150, para. 1343.

[170] *Local Competition Order* at 16151, para. 1345.

[171] *Local Competition Order* at 16151-52, para. 1347.

[172] *See, e.g., Local Competition Order* at 16161-62, paras. 1374-1375.

69. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements would likely facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[173] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *First Report and Order*. This finding has not been challenged. We do not believe that any rules that may be issued pursuant to the *Further Notice* will change this finding. We seek comment on this tentative conclusion.

70. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules*. None.

3. Comment Filing Procedures

71. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 2, 1997, and reply comments on or before October 17, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

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[173] *Local Competition Order*, 11 FCC Rcd at 16162, para 1376.

72. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules.[174] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

73. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

74. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201-205, 214, 251, 252, and 303(r) of the Communications

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[174] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii").

Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 214, 251, 252, and 303(r), the Third Order on Reconsideration is ADOPTED.

76. IT IS FURTHER ORDERED that changes adopted on reconsideration in section III.B. and the rule appendix will be effective 30 days after publication in the Federal Register.

77. IT IS FURTHER ORDERED, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), that the petitions for reconsideration filed by WorldCom, Inc. and the Local Exchange Carriers Coalition are DENIED IN PART and GRANTED IN PART to the extent indicated above.

78. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Third Order on Reconsideration and Further Notice of Proposed Rulemaking, including the associated Supplemental Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

79. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Final Rules

Part 51--INTERCONNECTION

1. The authority citation for part 51 continues to read as follows:

Authority: Sections 1-5, 7, 201-05, 218, l 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

2. Paragraph (d)(1) of Section 51.319 is revised to read as follows:

§ 51.319 Specific unbundling requirements.

*****

(d) *Interoffice Transmission Facilities*.

(1) Interoffice transmission facilities include:

(i) Dedicated transport, defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers;

(ii) Shared transport, defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC's network.

3. Section 51.515 is revised to read as follows:

§ 51.515 Application of access charges.

(d) Interstate access charges described in part 69 shall not be assessed by incumbent LECs on each element purchased by

requesting carriers providing both telephone exchange and exchange access services to such requesting carriers' end users.

August 18, 1997

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

RE: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Order on Reconsideration and Further Notice of Proposed Rulemaking

The Commission today reaffirms and clarifies a very important aspect of our Local Competition Order: the ability of a competitive local exchange carrier to obtain transport on a shared basis from the incumbent local exchange carrier. More fundamentally, this decision highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis -- a combination sometimes referred to as the UNE platform.

In the Telecommunications Act of 1996, Congress mandated that new entrants into the formerly monopolized local exchange market have the ability to choose any or all of three entry strategies: interconnection, resale and unbundled network elements. Congress correctly foresaw that new entrants would need these flexible strategies if they are to compete successfully with the incumbents and their extraordinary economies of scale and scope.

In its decision last month, the Eighth Circuit explicitly affirmed our authority under the Act to define unbundled network elements. This is a very important aspect of our local competition policies. Where the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers.

STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 251. Interconnection

* * *

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

* * *

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to

combine such elements in order to provide such telecommunications service.

(4) Resale. The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

* * *

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecomunications carrier seeking access to provide the services that it seeks to offer.

* * *

§ 252. Procedures for negotiation, arbitration, and approval of agreements.

* * *

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

* * *

(3) Wholesale prices for telecommunications services. For the purpose of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

* * *

FILED
MAR 28 1999
CLERK

(2)

No. 98-1381

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AT&T CORP., MCI WORLDCOM, INC., COMPETITIVE TELECOMMUNICATIONS ASSOCIATION AND TELECOMMUNICATIONS RESELLERS ASSOCIATION

Mark C. Rosenblum
Roy E. Hoffinger
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

David W. Carpenter*
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
1722 I Street, NW
Washington, D.C. 20006
(202) 736-8000

Counsel for AT&T Corp.
[Names of additional counsel appear inside]

April 28, 1999

*Counsel of Record

3588

Thomas F. O'Neil III
William Single IV
MCI WORLDCOM, INC.
1133 19th Street, NW
Washington, D.C. 20036
(202) 736-6096

Donald B. Verrilli, Jr.
Mark D. Schneider
JENNER & BLOCK
601 13th Street, NW
Washington, D.C. 20005
(202) 639-6000

Counsel for MCI WORLDCOM, Inc.

Carol A. Bischoff
COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 296-6650

Robert J. Aamoth
KELLEY, DRYE &
WARREN
1200 19th Street, NW
5th Floor
Washington, DC 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS
LAW GROUP
1620 I Street, NW
Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

AT&T Corp. has an equity or debt interest in the following publicly traded companies:

Cablevision Systems Corporation
Interactive Network, Inc., and
Telewest Communications PLC.

Competitive Telecommunications Association ("CompTel") is the principal national industry association representing competitive telecommunications carriers and their suppliers. Its nearly 315 members include large nationwide companies as well as scores of smaller regional carriers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

MCI WORLDCOM, Inc. has the following non-wholly-owned subsidiaries:

American Communications Services, Inc.
Cogni-Case, Inc.
Embratel Participacoes S.A.
General Communication Inc.
Genesys Telecommunications Laboratories Inc.
News T Investments, Inc.
News Triangle Finance, Inc.
Portugal Telecom

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 800 resale

carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

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INTRODUCTION

In this petition, incumbent local exchange carriers (LECs) are asking this Court summarily to reverse a decision of the Eighth Circuit by vacating, in its entirety, the FCC Order that the Eighth Circuit reviewed: the Third Report and Order in the FCC's local competition rulemaking.[1] The LECs claim that this Court's intervening decision in *AT&T Corp. v. Iowa Utilities Board* requires this result.[2] However, far from undermining the Eighth Circuit's decision, *AT&T Corp.* eliminates any basis for the arguments that the LECs advanced below and forecloses the relief they seek. Petitioners thus do not and cannot contend that the Eighth Circuit's decision contains any error. Moreover, because the specific FCC regulation that is nominally at issue (Rule 319) has already been vacated by *AT&T Corp.* (on grounds that were not raised or decided in this Eighth Circuit decision), and the LECs have therefore already obtained all the relief to which they are entitled, the only purpose that this petition could serve would be to allow illicit attempts to relitigate the other, independent questions that the FCC lawfully resolved in the *Third Order*.

In particular, the FCC's *Third Report and Order* clarified and reaffirmed the "shared transport" regulation (47 C.F.R. 51.319(d)(1)(ii)) that had been adopted in an earlier FCC order (the *First Report*) that this Court reviewed in *AT&T Corp.* In the Eighth Circuit, the LECs challenged the *Third Order* on the ground that the FCC had allegedly required LECs to lease to competitors combinations made up of the component parts of

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[1] *See* Third Order on Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997) ("*Third Order*") (Pet. app. 26a-87a).

[2] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

their telephone networks ("network elements"), which, the LECs claimed, was inconsistent with the Eighth Circuit's earlier holding that LECs could not be obligated to offer network elements in combined form. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). However, in the decision in this case, the Eighth Circuit distinguished its prior holding and rejected the LECs' challenge. Pet. app. 20a-21a. In *AT&T Corp.* this Court thereafter reversed the Eighth Circuit's prior decision and upheld the FCC's authority to require combinations of elements (*AT&T Corp.*, 119 S.Ct. at 736-38). This Court has thus eliminated the entire predicate for petitioners' challenges below to the *Third Order*. Petitioners therefore cannot dispute -- and do not dispute -- that the only claims that they raised in the Eighth Circuit were properly rejected.

Petitioners nevertheless ask this Court summarily to reverse the Eighth Circuit's decision because of this Court's independent holding in *AT&T Corp.* that the FCC, in determining which network elements should be made available to competitors, adopted an impermissible construction of the "necessary" and "impair" factors which Section 251(d)(2) of the Act requires the FCC to consider. Accordingly, this Court vacated FCC Rule 319, in which the FCC had identified the network elements (including shared transport) that were required to be made available. But that provides no basis for reversing the court of appeals. The Eighth Circuit decision that is the subject of the instant petition did not in any way address or concern Section 251(d)(2) or its "necessary" and "impair" factors because, as the Eighth Circuit expressly noted, the LECs raised no claim relating to Section 251(d)(2). Pet. app. 18a.

Nor, contrary to petitioners' claim, does the fact that Rule 319 has been vacated either require or permit summarily

vacating the *Third Order* itself. Indeed, petitioners' claim is foreclosed by *AT&T Corp.* For after vacating Rule 319, the Court went on in that case to address numerous other aspects of the FCC's definitions of individual network elements and decided the very claims about combinations that were the predicate for the LECs' challenge to the *Third Order*. That Rule 319 had been vacated did not lead this Court to vacate these *other* aspects of the *First Report and Order*. Thus, the vacation of Rule 319 for noncompliance with § 251(d)(2) neither moots the unrelated other issues that the *Third Order* and the Eighth Circuit decided nor permits vacating the *Third Order*.

In short, this petition has no legitimate objective. Because Rule 319 has been vacated in its entirety, there is now no FCC regulation presently requiring LECs to provide shared transport, and the FCC has initiated a new rulemaking proceeding to reconsider which network elements must be made available after full consideration of the factors set forth in § 251(d)(2). Petitioners have thus already received full relief with respect to the FCC's error in construing Section 251(d)(2). The only impact of reversing the court of appeals decision and vacating the *Third Order* would be improperly to permit petitioners to attempt to relitigate other issues that have nothing to do with Section 251(d)(2) and that were properly and finally resolved against them by the FCC, the courts, or both.

STATEMENT OF THE CASE

1. **The Telecommunications Act of 1996.** Like *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S.Ct. 721 (1999), this case arises out of the Telecommunications Act of 1996, an act that "fundamentally restructures local telephone markets" with the goal of introducing meaningful competition to the local

exchange market. *AT&T Corp.*, 119 S.Ct. at 726. In addition to prohibiting states from "enforc[ing] laws that impede competition," the Act requires monopoly LECs to "share [their] network[s] with competitors" in order to "facilitate market entry." *Id.* Specifically, Section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3), requires incumbent LECs to make certain "network elements" -- the equipment and facilities they use to provide telecommunications services -- available at cost-based rates to their competitors.

Three provisions of the Act are of particular relevance in defining the LECs' duty to provide access to unbundled network elements, and have been the subject of prior litigation among the parties. First, Section 153(29) (47 U.S.C. § 153(29)), defines the term "network element," and thus defines the universe of elements that are potentially subject to the unbundling obligation. Second, the FCC is charged with determining which of those network elements must in fact be made available by LECs to their competitors, and Section 251(d)(2) (47 U.S.C. § 251(d)(2)) identifies two factors that the FCC is required to "consider, at a minimum," in making that determination: whether "access to such network elements as are proprietary in nature is necessary" and whether "the failure to provide access to such network elements would impair the ability of the [requesting carrier] to provide the services that it seeks to offer" (the "necessary" and "impair" factors). Third, Section 251(c)(3) (47 U.S.C. § 251(c)(3)) addresses the terms on which LECs must offer access to those elements that they must make available -- requiring, for example, that the elements be made available "on an unbundled basis" and on "nondiscriminatory" terms. This case involves only the first and third of those provisions.

2. **The First Report and Order**. In compliance with its duty to establish regulations implementing section 251 within

six months of enactment of the 1996 Act (47 U.S.C. § 251(d)(1)), the FCC issued its *First Report and Order* in its "local competition" docket on August, 8, 1996.[3] Among other matters, the *First Report and Order* adopted a series of determinations that relate to the LECs' obligations with respect to unbundled network elements and that are of relevance here.

First, the FCC identified seven "elements" of the incumbents' networks. Those elements are: (1) the "local loop" (the wires connecting customers' premises with the phone company's switches); (2) the "network interface device" (which connects the loop to the customer's inside wiring); (3) switching; (4) "interoffice transmission facilities" (the wires that connect one switch to another); (5) "signaling networks and call-related databases"; (6) "operations support systems"; and (7) operator services and directory assistance. 47 C.F.R. 51.319. In identifying these seven network elements, the FCC rejected claims that some of these facilities or functions did not qualify as "network elements" under Section 153(29)'s definition of "network element."[4] Further, in addressing "interoffice transmission facilities," also known as "transport," the FCC distinguished between two types of transport, both of which it defined as network elements: "dedicated transport," a transport facility used uniquely by one carrier, and "shared transport," a transport facility shared by multiple carriers.

Second, the FCC construed Section 251(d)(2)'s "necessary and impair" factors as having been met whenever "the failure of

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[3] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("*First Report and Order*").

[4] *First Report and Order*, ¶¶ 413, 516.

an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[5] The FCC considered those factors in light of that construction, and then determined that each of the seven network elements must be made available to competitors.[6] Significantly, the FCC embodied its conclusions with respect to both the identification of network elements and the duty that each be made available in one rule -- Rule 319 -- which contained definitions of each network element and stated that they had to be made available to competitors. 47 C.F.R. § 51.319.

Third, the FCC held that Section 251(c)(3) did not require or permit it to impose a facilities-ownership requirement on the use or leasing of network elements.[7] In other words, the FCC concluded that a new entrant could choose to lease all of the incumbent's network elements and provide service without supplying any elements of its own (the "all elements rule").

Fourth, the FCC applied the nondiscrimination requirement of Section 251(c)(3) to hold that when requesting carriers lease two or more elements, the incumbent LECs are prohibited (except upon request) from disconnecting elements that are currently combined within their networks (Rule 315(b)). 47 C.F.R. § 51.315(b).

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[5] *Id.*, ¶ 285.

[6] *First Report and Order*, ¶¶ 388-89, 419-20, 446-47, 481-82, 490-91, 497-99, 521-22, 539-40.

[7] *First Report and Order*, ¶¶ 329-334.

3. **The Eighth Circuit's Review of the First Report and Order In *Iowa Utilities Board*.** On review, the court of appeals upheld the FCC's identification of the seven network elements against claims that some were outside the statutory definition of "network element" and against claims that the FCC had misconstrued Section 251(d)(2)'s "necessary" and "impair" standards. In particular, it rejected the LECs' challenge to the FCC's conclusion that operator services and directory assistance, vertical features of the switch, and operations support systems are "network elements" under Section 153(29), holding that the FCC's conclusion that each of these functionalities fell within the Act's definition of "network element" was reasonable.[8] The Eighth Circuit likewise concluded that the FCC's application of the "necessary" and "impair" standards, as well as its adoption of the "all elements rule," were reasonable constructions of the Act's terms.[9] However, concluding that the term "unbundled" meant "separated," and that any other construction of the term would impermissibly make the provision of service through network elements too similar to the provision of service through resale, the Eighth Circuit invalidated the FCC rule (Rule 315(b)) that prohibited LECs from separating network elements that existed in combined form when providing those elements to their competitors. This last holding was rendered not in the court of appeals' initial decision, but in a decision on rehearing issued three months later.[10]

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[8] *Iowa Utils. Bd.*, 120 F.3d at 808-810.

[9] *Id.*, 120 F.3d at 811-812, 814.

[10] *Id.*, 120 F.3d at 813.

4. **The FCC's *Third Order*.** After issuance of the Eighth Circuit's original opinion, but before issuance of its decision on rehearing invalidating Rule 315(b), the FCC issued its *Third Order*. In that *Order*, the FCC resolved certain petitions for reconsideration and/or clarification that were filed in response to the *First Report and Order*. In particular, although the *First Report and Order* had clearly required incumbent LECs to provide access to both "dedicated" and "shared" interoffice transmission facilities, 47 C.F.R. § 51.319(d)(1), some of the incumbent LECs had claimed that Rule 319's requirement that LECs provide access to facilities that were "shared among more than one customer or carrier" simply meant that new entrants could choose to share among themselves dedicated facilities purchased from the incumbent, but that the rule did not require incumbent LECs to provide on a shared basis access to the same interoffice transmission facilities that carried the incumbents' own interoffice traffic. The FCC rejected this claim, and reaffirmed that its rule required LECs to provide access to the transport network that carried their own interoffice traffic. Pet. app. 44a-47a.

In reaffirming that obligation, the FCC also rejected LEC claims that the transport network could not be a network element under Sections 153(29) or 251(c)(3). It rejected, for example, petitioner Ameritech's contentions that the "statutory definition" of network element is limited to facilities that are "dedicated to a customer" or "identifiable as a limited or pre-identified portion of the network." Pet. app. 59a-60a (¶¶ 41, 43). It further rejected Ameritech's claims that shared transport unlawfully required LECs to provide network elements in combined form rather than "unbundled," a statutory term which Ameritech claimed meant "separate[d]." Pet. app. 59a (¶ 42).

In addition, although no party had challenged the FCC's separate determination that the "necessary" and "impair"

standards supported a finding that shared transport should be made available as a network element, the FCC *sua sponte* reaffirmed its prior decision that they did. Pet. app. 52a-57a.

5. **The Eighth Circuit's Review of the *Third Order*.** On review, the incumbent LECs raised only two challenges to the *Third Order*. First, petitioners claimed that shared transport constituted an unlawful "preassembled combinations of network elements" in conflict with the court of appeals' holding invalidating Rule 315(b). See Petitioners' Eighth Circuit Brief, pp. 22-30. Second, petitioners claimed that by requiring incumbents to provide access to shared transport the FCC had unlawfully "eliminate[d] the crucial distinction between [network elements] and resale," *id.* at 31. As the Eighth Circuit noted, "petitioners do not argue that the FCC failed to give adequate consideration to either [of the factors set forth in] 47 U.S.C.A. § 251(d)(2)" -- *i.e.*, the Act's "necessary" and "impair" standards. Pet. app. 18a.[11]

The Eighth Circuit rejected both of the challenges the LECs raised. It held that "the plain meaning of the statute supports the FCC's determination that shared transport is a network element as defined in section 153(29)," Pet. app. 17a, and "decline[d] at this time to consider" petitioners' claim that shared transport undermined the "distinction between unbundled access to network elements and resale" because that argument "is predicated on [] speculative assumption[s]" as to how shared transport will be priced. Pet. app. 18a-19a. Because no party had challenged the FCC's application of the

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[11] For the convenience of the Court, the undersigned respondents have lodged with the Clerk 11 copies of petitioners' brief in the Eighth Circuit. Nowhere in that brief do petitioners even mention section 251(d)(2).

"necessary" and "impair" standards, the Eighth Circuit's opinion did not address whether the FCC gave "adequate consideration" to those factors. Pet. app. 18a.

6. **This Court's Decision in *AT&T Corp.* v. *Iowa Utils. Bd.*** In *AT&T Corp.*, this Court reviewed the Eighth Circuit's decision in *Iowa Utilities Board*. Unlike the Eighth Circuit, which had invalidated a number of the FCC's rules on both substantive and jurisdictional grounds, this Court found only one aspect of the FCC's determinations in the First Report and Order unlawful. Specifically, this Court held that the FCC's construction of the "necessary" and "impair" standards failed to give "substance" to those factors. *AT&T Corp.*, 119 S.Ct. at 734-36. Concluding that the FCC had failed to "consistently appl[y]" a proper interpretation of the necessary and impair standards, this Court vacated and remanded Rule 319 in its entirety, including the provision (319(d)) requiring that shared transport be made available. *AT&T Corp.*, 119 S.Ct. at 736, 738-39.

At the same time that it vacated Rule 319 on the ground that the FCC did not consistently apply a proper construction of the "necessary" and "impair" factors, the Court reviewed on the merits "the incumbent LECs' complaint that the FCC included within the features and services that must be provided to competitors under Rule 319 items that do not (as they must) meet the statutory definition of network element[s]" set forth in Section 153(29). *AT&T Corp.*, 119 S.Ct. at 733-34. Thus, while the Court independently vacated Rule 319, including the obligation to provide access to each of the network elements, it nevertheless affirmed on the merits the FCC's determination to identify "operator services and directory assistance, operational support systems (OSS), and vertical switching functions" as network elements and include them "under Rule 319." *Id.* at 734. The Court further reversed the court of

appeals' decision to invalidate Rule 51.315(b), finding that rule to be a reasonable construction of the Act. *Id.* at 736-38.

The Court likewise held that the "Commission's refusal to impose a facilities-ownership requirement was proper," *id.* at 736, and rejected the LECs' claims that by requiring them to provide access to all of their network elements in already-combined form and "on forward-looking costs" the FCC "eviscerate[d] the distinction between resale and unbundled access." *Id.* at 737. In reaching each of these conclusions, the Court noted the possibility that its "remand of Rule 319 may render the incumbents' concern on th[ese] score[s] academic." *id.* The Court nevertheless affirmed each of these FCC holdings on the merits.

ARGUMENT

1. Petitioners rely for their claimed entitlement to relief on *Lawrence* v. *Chater*, 516 U.S. 163 (1996), the principal case setting forth the standard for a "GVR" in federal cases that are not moot. They thus imply that they are seeking "entry of a GVR." See Pet. 5. But petitioners do not in fact ask for a genuine "GVR" -- a "remand[] to the United States Court of Appeals . . . for further consideration" (see *Lawrence* v. *Chater*, 516 U.S. at 175) -- for they do not ask that the court of appeals be afforded the opportunity to consider whether this Court's decision in *AT&T Corp.* affects the validity of any of its holdings in this case.

Instead, petitioners ask that the Court vacate the *Third Order* and remand directly *to the FCC*. That would constitute summary reversal of the court of appeals' decision. The court of appeals denied the LECs' petition for review and upheld the *Third Order*, and petitioners seek to reverse that decision and vacate the order that the Eighth Circuit let stand. That

petitioners seek to bypass the court of appeals is evident from the face of their petition. See, *e.g.*, Pet. (i)–(Question Presented) ("Whether the *Third Order* should be vacated . . . ."); *id.* 5 ("that Order should be vacated and remanded to the FCC"). *Lawrence* v. *Chater* obviously does not support such extraordinary relief, and petitioners cite no precedent that does.

Moreover, this case plainly does not warrant either of the two components of the relief which petitioners seek: reversal of the court of appeals or *vacatur* of the *Third Order*. With respect to the court of appeals, there is no error to reverse. Petitioners do not and cannot claim that the Eighth Circuit committed any error, because *AT&T Corp.* reversed those aspects of the prior Eighth Circuit decision in *Iowa Utilities Board* on which petitioners had relied below (unsuccessfully) for their claims in this case. Indeed, it is beyond dispute that if this case had been consolidated with *AT&T Corp.* the aspects of the FCC's *Third Order* that were challenged in the court of appeals would have been affirmed.

Nor is there any basis for the Court to vacate the *Third Order*. As the Eighth Circuit expressly noted, the LECs did not raise before it a challenge to the FCC's application of the "necessary" and "impair" factors in the *Third Order*, Pet. app. 18a, and none of the FCC's holdings that the LECs did challenge before the Eighth Circuit were remotely undermined by this Court's decision in *AT&T Corp.*

Indeed, even had the LECs preserved a challenge to the FCC's application of the Section 251(d)(2) factors, that would not have provided any basis for vacating the *Third Order* -- just as there would have been no basis for the Court in *AT&T Corp.* to vacate the entire *First Report and Order* because Rule 319 was vacated. *See infra*, p. 14-16. Insofar as the *Third Order*, in contrast to the Eighth Circuit's decision reviewing the LECs'

challenges to that Order, did address the Section 251(d)(2) factors, petitioners have already received all the relief to which the Court's holding on Section 251(d)(2) entitles them. Rule 319 has been vacated, and thus no longer creates a legal obligation under FCC regulation to offer shared transport. The FCC has initiated a new rulemaking proceeding to reconsider its application of Section 251(d)(2) and determine which network elements should be unbundled, and will be considering shared transport along with the other network elements in that proceeding.[12] If any obligation to offer shared transport continues to exist in particular circumstances prior to the conclusion of that proceeding, it can only be the function of other sources of law, such as state law or private agreements. Thus, in light of the fact that the LECs' interests under *AT&T Corp.* are already fully protected, the only possible reason for petitioners to seek reversal of the court of appeals' judgment and vacatur of the entirety of the *Third Order* is to enable them to relitigate in the future other issues, apart from those relating to Section 251(d)(2), that were raised and resolved against them in the opinion below or that were resolved against them by the FCC and not appealed to the Eighth Circuit. But such relitigation would be patently improper.

2. Nor is there any basis for a genuine "GVR." The Court has cautioned that "[r]espect for lower courts, the public interest in finality of judgments, and concern about [the court's] expanding certiorari docket all counsel against undisciplined

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[12] Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, FCC 99-70 (rel. Apr. 16, 1999)

GVR'ing." *Lawrence* v. *Chater*, 516 U.S. 163, 174 (1996). For these reasons, the Court will generally GVR a federal appellate court judgment in only two circumstances. First, the Court will GVR a case that has "become moot due to circumstances unattributable" to the party that lost below, and "whose review [was thus] prevented through happenstance." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) (internal citations and quotations omitted). Second, the Court will consider a GVR where the court of appeals' judgment rested on a proposition of law that has been called into doubt by an intervening legal development, and there is therefore a "reasonable probability" that "the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). Neither of these criteria is remotely satisfied here.

a. Petitioners do not even claim that this case has become moot, and with good reason. The litigation before the court of appeals concerned only two issues: (1) whether shared transport was an unlawful combination of elements in violation of Section 251(c)(3), and (2) whether defining shared transport as an element undermined the Act's purported distinctions between network elements and resale. Neither of these claims was rendered moot and unreviewable by this Court's decision to remand Rule 319 to the FCC for reexamination under a different construction of the "necessary" and "impair" factors.

The leading and controlling case for this proposition is the Court's decision in *AT&T Corp.* In that decision, the Court recognized that the FCC's conclusions that particular facilities and functions, such as operator services, constituted network elements under the statutory definition were embodied in Rule 319 (see *AT&T Corp.*, 119 S.Ct. at 734) -- the same rule that the Court simultaneously "invalidate[d]" as a result of the

FCC's error in construing Section 251(d)(2). *Id.* at 738. The Court likewise recognized that the disputes over the "all elements rule" and whether the FCC's order eliminated an alleged statutory distinction between network elements and resale might have been rendered "academic" in light of the remand of Rule 319. *Id.* at 736-37. The Court nevertheless addressed each of these issues on the merits, because the FCC's constructions of the network element definition, the scope of section 251(c)(3)'s unbundling obligation, and the Act's relationship between resale and network elements present questions that are legally distinct from those relating to its construction of section 251(d)(2)'s "necessary" and "impair" factors. The Court could not have ruled on the various issues resolved in Parts IIIA, IIIC and IIID of its opinion if its invalidation of Rule 319 in Part IIIB had rendered those disputes moot and nonjusticiable.

Because the disputes addressed in the court of appeals decision are not moot, petitioners could have chosen to seek plenary review of those determinations. Since they were not deprived of the opportunity of having the lower court's opinion reviewed on the merits, the petitioners are not entitled to have the judgment GVR'ed on this basis.

Petitioners nonetheless claim that they are entitled to the relief they seek because "the *Third Order* alters the reach of a regulation that no longer exists." Pet. 5. But that was likewise true of each of the FCC holdings resolved on the merits in Part IIIA of this Court's opinion in *AT&T Corp.* Each of the determinations reviewed there -- the FCC's conclusions that OSS, operator services and directory assistance, and vertical switching functions are within the statutory definition of "network element" under Section 153(29) -- were embodied in (and hence "altered") a regulation that, as a consequence of this Court's resolution of the "necessary" and "impair" issue, "no

longer exist[ed]." The Court did not believe that the appropriate course in such a circumstance was to remand those determinations to the FCC, and therefore could not have believed that those disputes had become moot. There is no basis for taking a different course with respect to the similarly-postured issues addressed and resolved in the decision below.

Relatedly, petitioners claim that the Court should grant the relief they seek because its decision in *AT&T Corp.* requires the FCC to "revisit" the decision whether to require that shared transport be made available. Pet. 5. Again, the same is equally true with respect to each of the elements contained in Rule 319, including OSS, operator services and directory assistance, and vertical features. On remand, the FCC will have to "revisit" whether each one of these elements should be made available after reconsidering the "necessary" and "impair" factors. That did not lead the Court to remand the FCC's determinations that each qualified as a network element under section 153(29), or to refrain from issuing a valid and binding judgment resolving the LECs' challenge to those elements on that basis. It likewise provides no basis for a GVR here.[13]

b. Nor would this case qualify for a GVR under *Lawrence* v. *Chater*. Pet. 5. Petitioners do not and cannot identify any ground for finding that the Court below would or should reconsider its decision in light of this Court's decision in *AT&T Corp.*

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[13] The LECs also note that the FCC on remand of Rule 319 will have to decide whether switching should be made available, and that shared transport is of no use to a competitor without the LECs' switching element. Pet. 6. This argument is irrelevant for the same reason.

Each of the claims raised below -- whether shared transport satisfies the network element definition, whether shared transport is an unlawful combination of separate elements, and whether requiring that shared transport be made available impermissibly blurs a distinction between unbundled elements and resale -- is unrelated to any issue regarding the application of section 251(d)(2)'s "necessary" and "impair" factors. Therefore, this Court's holding that the FCC failed to apply a proper interpretation of the "necessary" and "impair" standards has no bearing at all on the questions resolved in the opinion below.

Far from undermining the lower court's opinion, *AT&T Corp.* confirms its correctness. The LECs' unsuccessful claims before the court of appeals were that the *Third Order* could not be reconciled with the Eighth Circuit's prior decision in *Iowa Utils. Bd.* that the LECs could not be required to provide access to preexisting combinations of elements, and that the FCC's unbundling decisions could not undermine the asserted statutory distinction between network elements and resale. Each of those prior rulings, however, was reversed in *AT&T Corp.* *AT&T Corp.* thus eliminated the entire predicate for the LECs' claims.

In light of this Court's opinion in *AT&T Corp.*, there can be little doubt as to how this Court would have handled the issues raised below had the *Third Order* been consolidated for this Court's review along with the other two orders that were the subject of *AT&T Corp.* This Court would have addressed, and rejected, the LECs' specific challenges to shared transport in Parts IIIA and IIID -- the portions of its opinion that addressed the scope of the definition of network element, the requirement that existing combinations be provided, and the question whether the duties imposed on the LECs improperly conflated unbundled elements and resale -- while independently

addressing section 251(d)(2)'s standards in Part IIIB. In order words, it would have affirmed, not vacated, the court of appeals' holdings on shared transport. There is no reason for a different result simply because the Eighth Circuit's decision reviewing the *Third Order* was issued too late to be consolidated with its two earlier decisions in *Iowa Util. Bd.* v. *FCC* and *California* v. *FCC*.

3. For these reasons, if the Court were to GVR to the court of appeals, the court of appeals would simply (and properly) reinstate its prior decision. The petitioners apparently recognize that a genuine GVR would thus win them nothing they do not already have, and that is presumably why they seek the more radical relief of a summary reversal. But that merely underscores the illegitimacy of such relief. Having already obtained the full relief to which they are entitled as a result of the FCC's error regarding Section 251(d)(2), petitioners now seek to leverage that relief so as to vacate other, independent determinations on other issues that were properly and with finality resolved against them. There is no sound or equitable reason, however, to subject respondents to the burden of relitigating issues that are unaffected by the Court's construction of section 251(d)(2)'s "necessary" and "impair" factors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Mark C. Rosenblum
Roy E. Hoffinger
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3529

David W. Carpenter*
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
1722 I Street, NW
Washington, D.C. 20006
(202) 736-8000

*Counsel of Record

Counsel for AT&T Corp.

Thomas F. O'Neil III
William Single IV
MCI WORLDCOM, INC.
1133 19th Street, NW
Washington, D.C. 20036
(202) 736-6096

Donald B. Verrilli, Jr.
Mark D. Schneider
JENNER & BLOCK
601 13th Street, NW
Washington, D.C. 20005
(202) 639-6000

Counsel for MCI WORLDCOM, Inc.

Carol A. Bischoff
COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, NW
Suite 800
Washington, D.C. 20036
(202)296-6650

Robert J. Aamoth
KELLEY, DRYE &
WARREN
1200 19th Street, NW
5th Floor
Washington, DC 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS
LAW GROUP
1620 I Street, NW
Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

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No. 98-1381

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

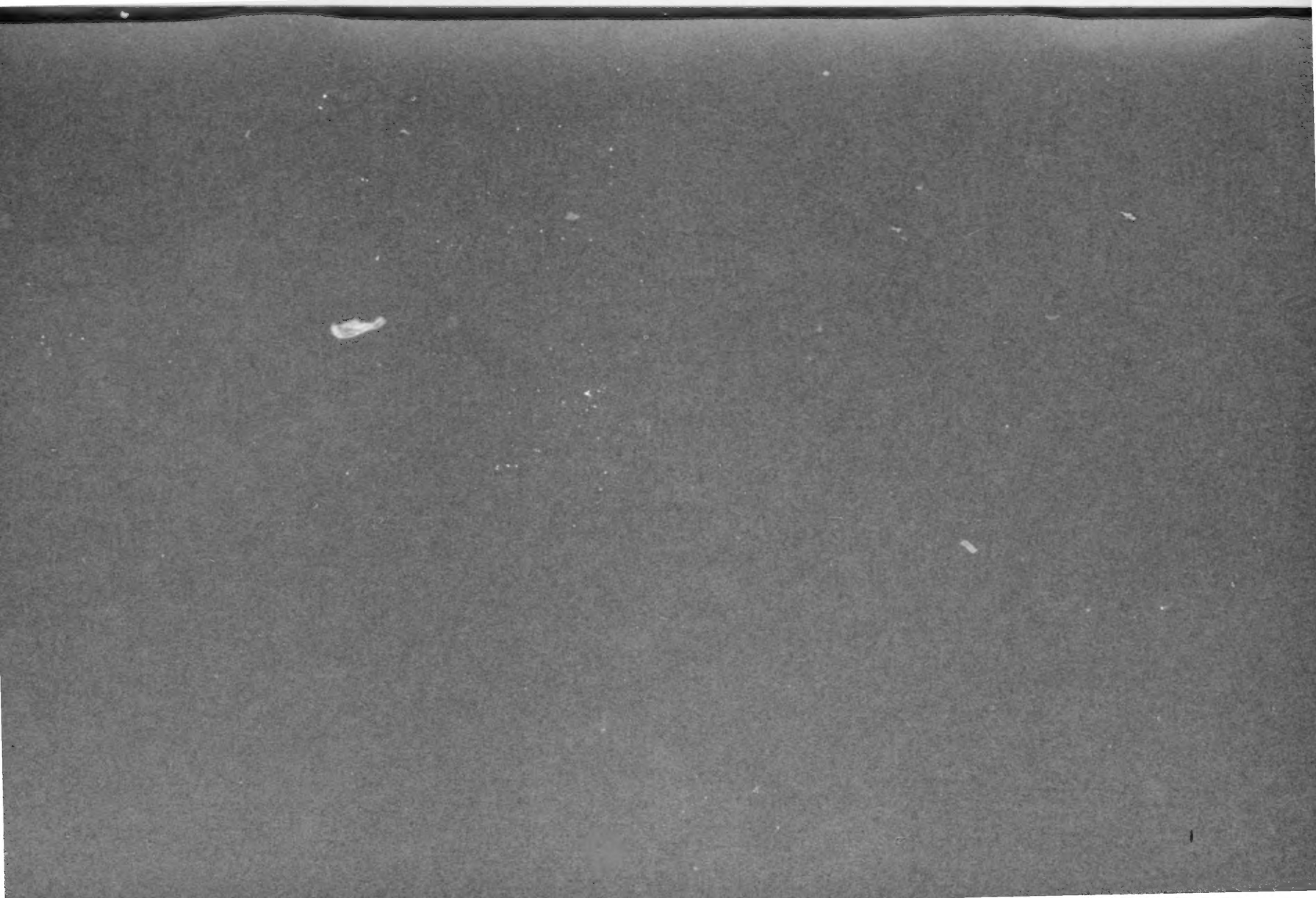
BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

JAMES M. CARR
Counsel
Federal Communications Commission
Washington, D.C. 20554



QUESTION PRESENTED

Whether this Court should summarily vacate the decision below and remand for further proceedings in light of *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721 (1999).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-24a) is reported at 153 F.3d 597. The Federal Communications Commission's *Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Pet. App. 26a- 84a), is reported at 12 F.C.C.R. 12,460.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1998. Pet. App. 1a-5a. A petition for rehearing was denied on December 4, 1998. Pet. App.

25a. The petition for a writ of certiorari was filed on February 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory background.* For many years, incumbent telephone companies—known as local exchange carriers (LECs)—have maintained monopoly control over local telephone facilities and the provision of local telephone service. To open local telephone markets to competition, Congress enacted the local competition provisions of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. 251 *et seq.* Those provisions impose on incumbent LECs "a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721, 726 (1999). Of greatest significance here, Section 251(c)(3) compels incumbents to provide new entrants with "nondiscriminatory access to network elements on an unbundled basis * * * on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3); see also *Iowa Utils. Bd.*, 119 S. Ct. at 726-727, 736-738.

The 1996 Act broadly defines the term "network element" to encompass any "facility or equipment used in the provision of a telecommunications service" as well as any "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. 153(29). The Act does not give new entrants automatic access, however, to every facility or functionality that falls within the scope of that definition. Instead, Section 251(d)(2) directs the Federal Communications Commission (FCC or Commission) to "consider, at a minimum," certain factors when determining "what network elements should be made available" to

new entrants. 47 U.S.C. 251(d)(2). Those factors are whether "access to such network elements as are proprietary in nature is necessary" and, as to other elements, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(A) and (B).

2. *The First Report and Order.* The substantive challenges presented in this petition—which relate to the Commission's application of the "necessary" and "impair" standards of Section 251(d)(2)—were raised on review of the FCC order that was before this Court in *Iowa Utilities Board*, not on review of the subsequent FCC order underlying *these* proceedings. For purposes of background, we discuss each FCC order in turn.

a. In August 1996, the FCC issued its *First Report and Order*, which adopted a comprehensive set of regulations to implement the local competition provisions of the 1996 Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,616-15,775 (1996) (¶¶ 226-541), aff'd in part and vacated in part, *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, *AT&T Corp.* v. *Iowa Utils. Bd.*, *supra*. One of those regulations was Rule 319, 47 C.F.R. 51.319, which listed seven basic categories of network elements that incumbent LECs must make available to new entrants.

The Commission included "interoffice transmission facilities" on that list. *First Report and Order*, 11 F.C.C.R. at 15,714-15,722 (¶¶ 428-451). Such facilities perform a critical function called "transport": *i.e.*, they

convey calls between switches.[1] In the *First Report and Order*, the FCC explained that the "interoffice transmission" element to which new entrants may gain access includes both "dedicated transport," which is the "exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier," and "shared transport," which is the "use of the features, functions, and capabilities of interoffice transmission facilities shared by *more than one* customer or carrier." 47 C.F.R. 51.319(d)(2)(i) (1997) (emphasis added).

b. On direct review, the incumbent LECs and other parties challenged the *First Report and Order* on a variety of grounds. Two of those challenges are relevant here. First, petitioners claimed that the FCC had misinterpreted the "necessary" and "impair" standards of Section 251(d)(2) and that this error had affected the Commission's determination, in Rule 319, of the elements that incumbents must make available to new entrants. Second, petitioners challenged a separate FCC regulation—Rule 315(b)—that bars incumbents from disconnecting previously combined elements when new entrants request access to those elements in combination. 47 C.F.R. 51.315(b). In challenging the latter regulation, the incumbents reasoned that Section 251(c)(3) requires incumbents to make network elements available only "on an unbundled basis," and they construed the term "unbundled" to mean "disconnected" rather than "separately priced." The incumbents also contended that, because Rule 315(b) gives new entrants efficient access to existing configurations

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[1] A network makes use of many switches to route telephone calls. Some of those switches are located at local "end offices." Others, called tandem switches, route telephone traffic between end offices (among other functions).

of network elements, it improperly blurs the statutory distinction between two different entry options: access to an incumbent's network elements under 47 U.S.C. 251(c)(3) and resale of an incumbent's finished services under 47 U.S.C. 251(c)(4).

In July 1997, the Eighth Circuit invalidated some portions of the *First Report and Order* and upheld others. First, the court upheld the Commission's application of the "necessary" and "impair" standards as a reasonable interpretation of Section 251(d)(2). 120 F.3d at 810-812. But, in a subsequent order issued in October 1997 and ultimately incorporated within its original opinion, the court invalidated Rule 315(b). It reasoned:

> [Section] 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

Id. at 813.

c. This Court granted certiorari to review the Eighth Circuit's decision, and, in January 1999, it decided *Iowa Utilities Board*. It repudiated the Eighth Circuit's basis for invalidating Rule 315(b) and held that the rule is a reasonable interpretation of Section 251(c)(3). See 119 S. Ct. at 737. In reinstating the rule, the Court specifically rejected the incumbents' two principal bases for challenging Rule 315(b): the arguments that the right of access to "unbundled" elements under Section 251(c)(3) is a right of access only to *disconnected* elements; and that Rule 315(b), by ensuring efficient, nondiscriminatory access to an incumbent's elements, had improperly "eviscerate[d]" the statutory distinction between network elements and resale. *Ibid.*

The Court separately determined, however, that the FCC had "not adequately consider[ed]" the "necessary" and "impair" standards of Section 251(d)(2) when setting forth the list of elements, contained in Rule 319, that incumbents must make available to new entrants. 119 S. Ct. at 734-736. The Court therefore vacated Rule 319 in its entirety and remanded that aspect of the case to the Commission for further consideration of *all* network elements under those standards.[2]

3. *The Third Order on Reconsideration.* In August 1997, after the Eighth Circuit had issued its initial decision in *Iowa Utilities Board* but shortly before that

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[2] On April 16, 1999, the FCC issued a notice of proposed rulemaking concerning application of the "necessary" and "impair" standards in light of this Court's decision in *Iowa Utilities Board*. See *Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-70. Those rulemaking proceedings are pending.

court issued its subsequent decision invalidating Rule 315(b), the FCC issued the order underlying *these* proceedings: the *Third Order on Reconsideration*, which clarified the obligation of incumbent LECs to provide shared transport. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 F.C.C.R. 12,460, 12,475-12,477 (1997) (¶¶ 25-26) (Pet. App. 26a- 84a) (*Third Order*).

In the *First Report and Order*, the Commission had determined that incumbents must "provide unbundled access to shared transmission facilities between end offices and the tandem switch." 11 F.C.C.R. at 15,718 (¶ 440). In the *Third Order*, the Commission clarified that when competing carriers request shared transport, incumbents must provide access to all of their interoffice transmission facilities—not just the links between end office switches and tandem switches, but also the trunks that transport phone calls from one end office to another or from one tandem switch to another. Pet. App. 47a-48a. The FCC also reaffirmed that shared transport falls within the statutory definition of network element, and it clarified, among other things, that the duty to provide shared transport requires incumbents, upon request, to share with new entrants the same interoffice transmission facilities that the incumbents themselves use. *Id.* at 58a-69a. Finally, the FCC reaffirmed its earlier finding in the *First Report and Order* that shared transport meets the "necessary" and "impair" standards of Section 251(d)(2). *Id.* at 52a-57a.

Petitioners, who are incumbent LECs, sought judicial review of the *Third Order* on several related theories. First, they claimed that, because the Commission had previously defined each interoffice transmission facility as a discrete network element, the

definition of shared transport in the *Third Order* combined multiple network elements into a single network element; similarly, they contended that the *Third Order* required them to provide interoffice transport in combination with switching, a separate network element. In both respects, they claimed, the Commission had done indirectly what the Eighth Circuit had recently ruled it could not do directly under Rule 315(b): compel incumbents to provide pre-assembled combinations of network elements to new entrants. Petitioners further claimed that, by requiring incumbents to provide separate elements in combination, the Commission's shared transport rules, like Rule 315(b) itself, would eviscerate the distinction between network elements and resale.

In August 1998, the Eighth Circuit rejected those arguments and upheld the *Third Order*. Pet. App. 1a-24a.[3] The court first held that the Commission had acted reasonably in determining that "shared transport" falls within the broad statutory definition of "network element" (47 U.S.C. 153(29)), even though shared transport might also be said to embrace a combination of constituent elements. See Pet. App. 15a-17a. In so holding, the court distinguished its earlier decision invalidating Rule 315(b). *Id.* at 19a-22a. The court also "decline[d] at this time" to invalidate the *Third Order* on the "speculative assumption" that, as implemented, the Commission's shared transport rules would ultimately blur the distinction between network elements and resale. *Id.* at 17a-19a.

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[3] The court observed that petitioners "d[id] not argue that the FCC failed to give adequate consideration" to the "necessary" and "impair" standards of Section 251(d)(2). Pet. App. 18a.

ARGUMENT

Petitioners base their request for relief on the proposition that the Commission misapplied the "necessary" and "impair" standards of Section 251(d)(2) in determining that shared transport should be made available to new entrants. But petitioners raised all of their judicial challenges concerning those standards in *Iowa Utilities Board*, on direct review of the *First Report and Order*, not in this case, on direct review of the *Third Order*. In *Iowa Utilities Board*, this Court addressed those challenges, vacated the Commission's implementation of Section 251(d)(2), and required the Commission to reconsider whether interoffice transport, along with all the other elements listed in the now-vacated Rule 319, meets the "necessary" and "impair" standards. That relief, which this Court has already ordered, is the only relief that petitioners could legitimately seek, and they will receive that relief if this petition is denied. The petition therefore *should* be denied, because nothing in *Iowa Utilities Board* casts doubt on the continuing validity of the independently significant holdings below, which had nothing to do with the "necessary" and "impair" standards.

1. A summary order (known as a GVR) granting certiorari, vacating the judgment below, and remanding the case is "potentially appropriate" where "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That, indeed, is the legal formulation on which petitioners appear to rely in

seeking a GVR. See Pet. 5 (citing quoted passage of *Lawrence* v. *Chater*). But that very formulation reveals why a GVR would be inappropriate here. Petitioners do not and could not claim that any aspect of this Court's decision in *Iowa Utilities Board* draws the holdings of the decision below into question.

a. Although petitioners inaccurately suggest otherwise (Pet. 5), the court of appeals was correct when it observed that petitioners "d[id] not argue" on review of the *Third Order* "that the FCC failed to give adequate consideration" to the "necessary" and "impair" standards of Section 251(d)(2). Pet. App. 18a.[4] Instead,

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[4] Petitioners did not even cite Section 251(d)(2) in their opening brief in the court of appeals. In their reply brief, they cited that provision only in arguing that "[t]he FCC's discretion under section 251(d)(2)(B) to determine what network elements must be made available is necessarily constrained by the *other* provisions of the 1996 Act—sections 251(c)(3) and (4) and section 3(29)[.]" Ameritech C.A. Reply Br. 17 (emphasis added). Petitioners did not argue that the *Third Order* violated Section 251(d)(2) itself, and the court therefore had no occasion to address the issue. See Pet. App. 18a. For its part, the court of appeals referred to Section 251(d)(2) as a source of the FCC's statutory "authority" to determine what network elements must be made available (*e.g.*, *id.* at 17a, 21a), but that reference did not relate to the content of the "necessary" and "impair" standards. Instead, the court relied on the introductory clause of Section 251(d)(2)—which identifies the FCC as the agency that "determin[es] what network elements should be made available"—as the Commission's *source of jurisdiction* to issue *any* rules regarding network elements. The Eighth Circuit needed to rely on that introductory clause for that purpose because it had earlier held that no other provision of law authorized the Commission (as opposed to state public utility commissions) to exercise such jurisdiction. See 120 F.3d at 793-807. This Court subsequently clarified that 47 U.S.C. 201(b) grants the FCC plenary regulatory jurisdiction to implement the

petitioners challenged the *Third Order* on the quite different ground that "shared transport" is not properly defined as an element in its own right, but is instead a combination of separate constituent elements. See Ameritech C.A. Br. 24-30. Petitioners argued that entitling new entrants to any preassembled combination of elements would violate the rationale of the Eighth Circuit's prior decision vacating Rule 315(b), in which the court had held (120 F.3d at 813) that the text and structure of the 1996 Act prevent new entrants from gaining access to elements in their precombined form. See Ameritech C.A. Br. 24-30; see generally pp. 7-8, *supra*. The Eighth Circuit rejected that argument and distinguished its earlier decision vacating Rule 315(b). See Pet. App. 19a-22a.

In *Iowa Utilities Board*, this Court reinstated Rule 315(b) and, in so doing, refuted the very premise of the arguments petitioners had presented to the Eighth Circuit on review of the *Third Order*. This Court determined that, contrary to the Eighth Circuit's prior rationale for invalidating Rule 315(b), "[i]t was entirely reasonable for the Commission to find" that the 1996 Act compels incumbents to provide network elements in their precombined form rather than "in discrete pieces." 119 S. Ct. at 737. The Court similarly rejected, as a basis for challenging Rule 315(b), the incumbents' related argument that entitling a new entrant to preassembled combinations of an incumbent's elements would "eviscerate[] the distinction between resale and unbundled access." *Ibid.*

Iowa Utilities Board thus forecloses every argument that petitioners raised on review of the *Third Order* as

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provisions of the 1996 Act, including Section 251. See 119 S. Ct. at 729-733.

a basis for withholding shared transport from new entrants. And even if that were not the case, the relevant question here is whether *Iowa Utilities Board* "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. at 167. Petitioners could not possibly satisfy that test. They do not and could not contend that anything in *Iowa Utilities Board* casts doubt on whether the arguments that they raised on review of the *Third Order*—the only arguments considered in the decision below—were properly rejected. See p. 14, *infra*. There is accordingly no basis for vacating that decision, and the petition should be denied.

b. Denial of the petition would not deprive petitioners of the ultimate relief they ostensibly seek: reconsideration by the Commission, in light of this Court's order vacating Rule 319, of whether shared transport meets the "necessary" and "impair" standards of Section 251(d)(2).

On direct review of the *First Report and Order*, petitioners presented a global challenge to the Commission's interpretation of the "necessary" and "impair" standards. They claimed that the Commission's misapplication of those standards had infected the entire list of elements, set forth in Rule 319, that "should be made available" to new entrants. 47 U.S.C. 251(d)(2). One of the items on that list was interoffice transport, of which shared transport is a species. In *Iowa Utilities Board*, this Court vacated Rule 319 on the ground that the Commission had indeed misinterpreted Section 251(d)(2) with respect to *all* network elements,

including interoffice transport. See 119 S. Ct. at 734-736.[5]

This Court's decision therefore requires the Commission to reconsider the question that was not presented on direct review of the *Third Order*: whether shared transport, like the other elements listed in Rule 319, meets the "necessary" and "impair" standards. Until the Commission conducts that inquiry, Rule 319 will remain vacated and could not impose enforceable obligations to provide shared transport or any other element, although in particular cases such obligations might independently rest on other sources of law. And,

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[5] As petitioners observe (Pet. 3), "the *Third Order* addressed the definition of 'interoffice transmission facilities,' one of the network elements to which unbundled access was required in (the now-vacated) Rule 319." In particular, the *Third Order* amended the definition of "shared transport" in Rule 319(d)(1), while leaving intact Rule 319(d)(2), "which imposed the actual obligation upon incumbent LECs to provide unbundled access to interoffice transport." Pet. 4. Because this Court vacated Rule 319 in its entirety, it vacated all portions of Rule 319 imposing an obligation to provide interoffice transport, including shared transport. There is thus no respect in which a denial of certiorari in this case could shield the Commission from its obligation to reconsider whether shared transport meets the "necessary" and "impair" standards of Section 251(d)(2). That is so even though—in a passage of the *Third Order* which petitioners did not challenge in the court of appeals, and which that court thus had no occasion to review—the Commission addressed those standards under its prior, now-vacated interpretation. See Pet. App. 52a-57a. Of course, if our analysis on this point were incorrect, and if this Court's vacatur of Rule 319 for some reason did *not* require the Commission to reconsider whether shared transport meets the "necessary" and "impair" standards, it would then follow that petitioners had waived their present challenge by failing to preserve it on direct review of the *Third Order*. See generally Pet. App. 18a; see also note 4, *supra*.

most important for present purposes, the Commission will have to conduct the "necessary" and "impair" inquiry with respect to every element, including shared transport, whether or not this Court vacates the decision below. Put another way, petitioners will obtain the exact relief they ostensibly seek here even if their petition is denied.

Especially in light of that consideration, the petition *should* be denied. The only effect of a GVR would be to vacate important Eighth Circuit holdings that are distinct from any question about the content of the "necessary" and "impair" standards and are not even disputed here. The Eighth Circuit upheld the *Third Order* over petitioners' claims that the FCC had erred in defining shared transport as a network element in the first place and that the availability of shared transport would eviscerate the distinction between network elements and resale as entry options. See Pet. App. 15a-22a. Petitioners do not challenge the Eighth Circuit's disposition of *those* issues, nor do they claim that the court's reasoning is materially inconsistent with *Iowa Utilities Board*. Indeed, as discussed, *Iowa Utilities Board* in fact forecloses the very arguments that petitioners pressed in the Eighth Circuit.

Thus, far from justifying a GVR, *Iowa Utilities Board* in fact confirms that petitioners have no basis for relitigating the issues decided below. Although a GVR would leave the Eighth Circuit free to reinstate its prior holdings, and even though that would be the proper course for it to take,[6] the very issuance of a

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[6] In two passages, petitioners appear to seek not a GVR—which would permit the Eighth Circuit to consider in the first instance the effect, if any, of *Iowa Utilities Board* on its prior decision—but an order affirmatively directing the Eighth Circuit

GVR would undoubtedly incite an unnecessary round of litigation in that court on the significance of this Court's summary order. As this Court has explained, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence* v. *Chater*, 516 U.S. at 168. Here a GVR would create no "potential benefits" at all, but only "delay and further cost."

2. Although they do not clearly say so, petitioners suggest more broadly that the decision vacating Rule 319, and lifting any current obligation under that rule to provide shared transport or switching, requires invalidation of *any* determination concerning shared transport, no matter how consistent the determination may be with the reasoning of *Iowa Utilities Board*. See Pet. 5-6. Any such argument would be irreconcilable with *Iowa Utilities Board* itself.

Apart from vacating Rule 319, this Court addressed and upheld a variety of FCC determinations concerning network elements. The Court perceived no inconsistency between upholding those determinations and invalidating Rule 319. The Court held, for example, that the Commission had reasonably determined that "operator services" and "operational support systems" (OSS) fall within the statutory definition of network element (47 U.S.C. 153(29)), even though the Court simultaneously vacated the portions of Rule 319

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to vacate the *Third Order*. See Pet. i (question presented), 5; but cf. Pet. 6 (conclusion). Such substantive relief would be inappropriate even if a GVR were warranted. If this Court does not deny the petition outright, it should at most enter a standard GVR order granting the petition, vacating the judgment *of the court of appeals*, and remanding *to that court* for further proceedings. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. at 175.

requiring *those* elements to be made available, and even though on remand the Commission must reconsider whether they should even appear on the list of elements to which new entrants may gain access. See 119 S. Ct. at 733-736. Similarly, the Court held that the FCC had "reasonably omitted a facilities-ownership requirement" (which would have compelled new entrants to obtain facilities of their own before gaining access to any of an incumbent's elements), even though the Court added that "[t]his issue may be largely academic in light of our disposition of Rule 319." *Id.* at 736.

In each of those holdings, this Court made clear that its invalidation of Rule 319, and its remand for reconsideration by the Commission of the "necessary" and "impair" standards, does not somehow foreclose resolution of network-element disputes that are analytically distinct from disputes about the "necessary" and "impair" standards themselves. Here, the Eighth Circuit's holdings about shared transport have nothing to do with those standards, are important in their own right, and remain just as valid in the wake of *Iowa Utilities Board* as this Court's own holdings about operator services, OSS, and the proposed "facilities ownership" requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.[7]

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CHRISTOPHER J. WRIGHT
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

JAMES M. CARR
Counsel
Federal Communications Commission

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[7] See also note 6, *supra*.

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No. 98-1381

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID SOHN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DAN L. POOLE
ROBERT B. MCKENNA
U S West, Inc.
1801 California Street
51st Floor
Denver, Colorado 80202
(303) 672-2861

Counsel for U S WEST, Inc.

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

* *Counsel of Record*

THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Ameritech Corporation

14 pp

WILLIAM P. BARR
WARD W. WUESTE, JR.
M. EDWARD WHELAN
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

PAUL T. CAPPUCCIO
STEVEN G. BRADBURY
PATRICK F. PHILBIN
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 897-5000

Counsel for the GTE Entities

LAWRENCE E. SARJEANT
LINDA KENT
KEITH TOWNSEND
JOHN W. HUNTER
United States Telephone Assn
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States Telephone Association

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

Counsel for Ameritech Corporation

MICHAEL E. GLOVER
JAMES G. PACHULSKI
Bell Atlantic Corporation
1320 N. Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Bell Atlantic Corporation

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REPLY BRIEF IN SUPPORT OF THE PETITION

The government and its supporting intervenors acknowledge that this Court invalidated Rule 319(d), the FCC's "shared transport" regulation, as inconsistent with the Telecommunications Act of 1996 ("1996 Act"). See *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721, 735-36 (1999). The only dispute here concerns what should be done with the judgment below upholding the FCC's *Third Order*,[1] which reaffirmed and expanded the scope of that very regulation. See Pet. App. 17a (affirming "the FCC's determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3)").

The question answers itself. Nobody disputes that, by vacating Rule 319 in its entirety, this Court invalidated the shared transport regulation. All parties also agree that the FCC must and will consider on remand from *Iowa Utilities Board* whether shared transport satisfies the 1996 Act's unbundled access provisions, as properly interpreted. Gov't Br. 9, 12-14; AT&T Br. 13. Because the Eighth Circuit's judgment upheld an FCC order that reaffirms and expands an invalid regulation imposing an unlawful and unenforceable obligation, the judgment should be vacated and remanded for reconsideration together with the network element remand proceedings from *Iowa Utilities Board*. Such relief not only is proper in its own right, but also would dispel lingering confusion in the lower courts — confusion sowed in large measure by the intervenors — concerning the status of the *Third Order*'s shared transport requirement after *Iowa Utilities Board*.

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) ("*Third Order*") (Pet. App. 26a-84a), petition for review denied, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 597 (8th Cir. 1998) (Pet. App. 1a-24a).

1. The government and its supporting intervenors do not and could not argue that this Court is without power to GVR the Eighth Circuit's judgment. Rather, they incorrectly maintain that this case does not satisfy the prudential standard set forth in *Lawrence* v. *Chater*, 516 U.S. 163 (1996), for entering a GVR. See Gov't Br. 9-15; AT&T Br. 11-14.

Under *Lawrence*, a GVR is appropriate "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." 516 U.S. at 167. This case plainly satisfies that standard.

The "intervening development" is this Court's ruling that the Rule 319(d) shared transport regulation, along with the remainder of Rule 319, is invalid under the 1996 Act. The "decision below" is the Eighth Circuit's judgment upholding the *Third Order*, which reaffirmed and expanded the scope of Rule 319(d). The "premise" underlying that judgment was the assumption that Rule 319(d) was valid and enforceable under the 1996 Act. In light of *Iowa Utilities Board*, that premise is one that the Eighth Circuit undoubtedly "would reject if given the opportunity." Finally, the Court's invalidation of Rule 319(d) may — indeed, certainly would — lead the court of appeals to reconsider and reverse its previous decision upholding the *Third Order*. Pet. App. 17a.

In an effort to escape the clear implication of *Lawrence*, the government and its intervenors attempt to divert attention from the Eighth Circuit's actual judgment to the grounds expressed by the court in support of that judgment. Gov't Br. 10-12; AT&T Br. 16-18. The tactic is futile. This Court reviews judgments, not statements in opinions. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Thus, although the Eighth Circuit correctly rejected

certain of the arguments advanced against the *Third Order*, what is important here is not the Eighth Circuit's rationale for its judgment, but the judgment itself. Under *Lawrence*, that judgment is the "decision below" whose central premise (*i.e.*, the existence of a valid shared transport regulation) was eliminated by the Court's intervening decision in *Iowa Utilities Board*.

Shifting gears, the government and intervenors next maintain that the Eighth Circuit's judgment should stand because *Iowa Utilities Board* already provides the relief petitioners seek here: the invalidation, remand and reconsideration of Rule 319(d). Gov't Br. 12-13; AT&T Br. 13. They argue, in other words, that the Court should leave intact an admittedly invalid lower court judgment because *Iowa Utilities Board* already made clear that the judgment is invalid. This is a non sequitur. The fact that the Eighth Circuit's judgment upholds an unlawful regulation, and therefore itself is invalid, only *confirms* that a GVR is warranted. See *Lawrence*, 516 U.S. at 167-68.[2]

The government also claims that a GVR is not appropriate because it would yield no benefits while imposing delay and further costs. Gov't Br. 15. The principal cost cited by the government is the supposedly "unnecessary round of litigation" that would ensue in the court of appeals. *Ibid.* This concern is a chimera. If a GVR were issued, the lone question before the Eighth Circuit would be whether to reaffirm its decision upholding the *Third Order*'s shared transport requirement (even though the underlying regulation has been found invalid), or to remand the *Third Order* to the FCC for reconsideration together with the network element

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[2] Moreover, inasmuch as the government is correct that the *Third Order*'s amended shared transport regulation already has been invalidated, this case may be moot and the judgment below should be vacated on nonjusticiability grounds. See, *e.g.*, *Anderson* v. *Green*, 513 U.S. 557 (1995).

remand proceedings from *Iowa Utilities Board*. That question would demand no more than abbreviated proceedings in the court of appeals. It is difficult to imagine that any party would urge the Eighth Circuit to uphold the *Third Order*'s shared transport requirement, or that the court below would not simply remand the cause to the FCC.[3]

Another alleged cost cited by the government is that a GVR would wipe out "independently significant holdings" of the Eighth Circuit that are unrelated to the FCC's improper interpretation of the Section 251(d)(2) "necessary and impair" standard. Gov't Br. 9, 14. As noted above, this Court reviews judgments, not statements in opinions. If the Eighth Circuit's judgment is incorrect, which it undoubtedly is, the court's disposition of the parties' arguments is immaterial.

In any event, the Eighth Circuit's central holding is hardly worth saving. At the time this case was briefed and

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[3] The government's supporting intervenors incorrectly suggest that the petition for certiorari seeks a direct remand to the FCC. AT&T Br. 11-12. Rather, the petition simply seeks vacatur of the decision below and remand to the court of appeals. Pet. 6. In remanding this case, however, this Court would be justified in instructing the Eighth Circuit to vacate and remand the *Third Order* to the FCC for reconsideration in light of *Iowa Utilities Board*. See 28 U.S.C. § 2106; *City of Bridgeport* v. *Bridgeport Coalition for Fair Representation*, 512 U.S. 1283 (1994) (GVR to the court of appeals with instructions to vacate the district court's judgment and remand to the district court for further consideration in light of intervening decision); *Kilpatrick* v. *Heckler*, 472 U.S. 1004 (1985) (GVR to court of appeals with instructions to remand case to the district court with instructions to remand case to agency); *Pastrana de Caraballo* v. *Heckler*, 471 U.S. 1113 (1985) (same); *Board of Governors of the Federal Reserve System* v. *Security Bancorp*, 454 U.S. 1118 (1981) (GVR to court of appeals with instructions to remand to agency to vacate administrative decision); *Spitzer Akron, Inc.* v. *NLRB*, 411 U.S. 979 (1973) (GVR to court of appeals with instructions to remand to agency for consideration of intervening decisions); *Atlas Engine Works, Inc.* v. *NLRB*, 395 U.S. 828 (1969) (same).

decided in the court of appeals, Eighth Circuit precedent held that requiring incumbent LECs to provide their competitors with preassembled combinations of network elements was inconsistent with the 1996 Act. *Iowa Utilities Board* v. *FCC*, 120 F.2d 753, 813 (8th Cir. 1997). In light of that precedent, the *Third Order* was challenged on the ground that shared transport was such a preassembled network element combination. Interpreting and applying its precedent, the Eighth Circuit held that shared transport was not a forbidden preassembled combination. Pet App. 19a-22a. That holding is now meaningless, given this Court's subsequent ruling that incumbent LECs may be required to provide preassembled combinations under the 1996 Act. In fact, the holding may be moot in light of this Court's invalidation of Rule 319. *Iowa Utilities Board*, 119 S. Ct. at 737 ("our remand of Rule 319 may render the incumbents' concern [about preassembled combinations] academic"). There is nothing to be gained by preserving the Eighth Circuit's application and interpretation of its previous and now-invalid holding.

While a GVR would impose few (if any) costs, it would yield significant benefits. As an initial matter, a GVR would vacate a facially invalid lower court judgment. Even more important, a GVR would dispel lingering confusion in the state commissions and lower federal courts over whether the shared transport requirements set forth in the *Third Order* and upheld by the judgment below somehow survived this Court's vacatur of Rule 319 in *Iowa Utilities Board*.

Indeed, supporting intervenors' apparent motive in opposing certiorari is to perpetuate that confusion. Contrary to the position they adopt in this Court, certain intervenors have contended in the lower courts — with some success — that the *Third Order* and the judgment below not only remain viable after *Iowa Utilities Board*, but continue to obligate incumbent LECs to provide shared transport as an unbundled

network element under Section 251(c)(3).[4] By vacating the Eighth Circuit's judgment, this Court will foreclose this improper and misleading tactic, avoid unnecessary litigation in the district courts and courts of appeals, and ensure that incumbent LECs are not subject to a shared transport obligation that all parties agree (at least in this forum) is invalid and unenforceable.

2. The government and intervenors suggest that petitioners are not entitled to a GVR because petitioners did not argue in the court of appeals that the *Third Order* misapplied Section 251(d)(2). Gov't Br. 10-12; AT&T Br. 17-18. This argument misses the point. Petitioners seek a GVR on the ground, among others, that *Iowa Utilities Board* eliminated the central premise underlying the *Third Order* and the Eighth Circuit's judgment (*i.e.*, the assumed validity of the FCC's shared transport regulation). Pet. 5. The government and intervenors do not and could not argue that petitioners waived *that* argument.

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[4] See, *e.g.*, *Wisconsin Bell, Inc.* v. *Public Service Comm'n of Wisconsin*, Civ. Action No. 98-C-11-C (W.D. Wis.), Supplemental Brief of MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., at 21-25 (filed Mar. 11, 1999). Intervenors AT&T and MCI prevailed on this argument in *Michigan Bell Tel. Co.* v. *Strand*, 26 F.Supp.2d 993 (W.D. Mich. 1998) (upholding State commission order requiring incumbent LEC to provide shared transport, based upon the *Third Order* and the judgment below), reconsideration denied (Mar. 17, 1999) ("for the reasons stated [by AT&T and MCI] in the Brief in Opposition, the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[] supports, not contradicts, the reasoning behind the Court's issuance of judgment in this matter"). MCI recently attempted to parlay that victory into another. See *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, No. 97 C 2225 (N.D. Ill.), MCI's Motion for Leave to File Supplemental Authority, at 3 (filed May 5, 1999) (citing *Strand*'s denial of reconsideration to argue that *Iowa Utilities Board* "supports, not contradicts" view "that the FCC's regulations require Ameritech to provide shared transport").

Nor did petitioners waive their argument that shared transport fails to satisfy the Section 251(d)(2) "necessary and impair" standard. When petitioners filed their briefs in the court of appeals, a previous Eighth Circuit panel already had upheld the FCC's interpretation of Section 251(d)(2). *Iowa Utilities Board* v. *FCC*, *supra*, 120 F.3d at 810. Petitioners, of course, preserved the issue in this Court and ultimately prevailed in *Iowa Utilities Board* — after the Eighth Circuit issued its judgment in this case. Having contemporaneously preserved the Section 251(d)(2) issue in this Court, there would have been no point for petitioners to reassert their argument in the court of appeals in this case and "demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which [petitioners were] privy and over [their] vigorous objection." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). This Court may "undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Id.* at 44-45; see also *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). This principle applies with equal force where, as here (Pet. App. 17a-18a), the court of appeals gives "summary treatment" to the issue at hand. See *Williams*, 504 U.S. at 42 n.2.

Moreover, in the immediate aftermath of the Eighth Circuit's affirmance of the FCC's toothless interpretation of Section 251(d)(2), it would have been equally pointless for petitioners to press the specific argument that shared transport failed to satisfy that provision. As this Court held, the FCC had rendered Section 251(d)(2) a nullity by interpreting

it to mean "that whatever element can be provided must be provided." *Iowa Utilities Board*, 119 S. Ct. at 735.[5]

3. Finally, the government and its supporting intervenors contend that a GVR would be inappropriate because *Iowa Utilities Board* did not invalidate *all* aspects of the *Third Order* and the Eighth Circuit's opinion. Gov't Br. 15-16; AT&T Br. 12-13. This contention is absurd. It may be that certain portions of the *Third Order* and certain holdings of the Eighth Circuit remain viable after *Iowa Utilities Board*. However, the *Third Order* is unlawful insofar as it reaffirmed and expanded the scope of the now-vacated FCC Rule 319(d). And the judgment below is erroneous insofar as it upholds the *Third Order*'s "determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3)." Pet. App. 17a. A GVR certainly is warranted under these circumstances.

In fact, the FCC only recently advocated analogous relief in an Iowa federal district court. The state commission required the incumbent LEC to provide shared transport as an unbundled network element, and the incumbent appealed that determination to the federal district court under 47 U.S.C. § 252(e)(6). Acting as *amicus*, the FCC urged the district court to remand the shared transport provision to the state commission in light of this Court's vacatur and remand of Rule 319 in *Iowa Utilities Board*. See *U S WEST Communications, Inc.* v. *Thoms*, Civ. Action No. 4-97-CV-70082 (S.D. Iowa), Supplemental Brief of the Federal Communica-

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[5] In any event, petitioners did argue below that access to shared transport — which is nothing short of the incumbent LEC's entire interoffice network — is not essential for competitors to compete in local service markets, but rather provides an unfair advantage that Congress never intended. See C.A. Br. 31-35; C.A. Reply Br. 16-25 (arguing, *inter alia*, that shared transport is not essential to the prospects for broad-based local competition).

tions Commission as *Amicus Curiae*, at 9 (filed Mar. 15, 1999). The FCC correctly argued that incumbent LECs could not be required to provide shared transport unless and until the FCC makes "its threshold determinations with respect to Section 251(d)(2)" on remand. *Ibid.*

In sum, petitioners seek to vacate a court of appeals judgment upholding an FCC regulation that *all parties agree is invalid and unenforceable*. Such relief not only is proper in its own right, but also would dispel confusion as to the legal status of the *Third Order*'s amended shared transport requirement after *Iowa Utilities Board*. Neither the government nor its supporting intervenors provide any principled basis for denying this sensible housekeeping relief.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for reconsideration with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*, *supra*.

Respectfully submitted.

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID SOHN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DAN L. POOLE
ROBERT B. MCKENNA
U S West, Inc.
1801 California Street
51st Floor
Denver, Colorado 80202
(303) 672-2861

Counsel for U S WEST, Inc.

MICHAEL E. GLOVER
JAMES G. PACHULSKI
Bell Atlantic Corporation
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Bell Atlantic Corporation

WILLIAM P. BARR
WARD W. WUESTE, JR.
M. EDWARD WHELAN
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

Counsel for the GTE Entities

KENNETH S. GELLER *
DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

THEODORE A. LIVINGSTON
JOHN E. MUENCH
GARY S. FEINERMAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

Counsel for Ameritech Corporation

LAWRENCE E. SARJEANT
LINDA KENT
KEITH TOWNSEND
JOHN W. HUNTER
United States Telephone Assn
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States Telephone Association

PAUL T. CAPPUCCIO
STEVEN G. BRADBURY
PATRICK F. PHILBIN
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 897-5000

Counsel for the GTE Entities

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